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CONSIDERATIONS
ON
CRIMINAL LAW.

V O L. III.

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CONSIDERATIONS
ON
CRIMINAL LAW.

By HENRY DAGGE, Esq;

V O L. III.

THE SECOND EDITION, CORRECTED,
AND GREATLY ENLARGED.

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A P P E N D I X.

HAVING, in the foregoing Essay, had occasion to contravert some of the principles advanced in the very learned and ingenious treatise, intituled, *Considerations on the Law of Forfeiture for High Treason*, I shall here attempt a candid examination of some of the propositions contained in that treatise, as the doing it in the course of the Essay itself would have led me into too large a field of digression. Before, however, I enter upon the consideration of the subject, I think it necessary to pre-

VOL. III. B mise,

mise, that I am fully persuaded the anonymous Author of those Considerations writes from conviction, and with a view to the firm and lasting establishment of our happy constitution. Men nevertheless may agree with respect to the end, and yet differ with regard to the means.

The very able and acute Writer has, with great power of argument and depth of penetration, endeavoured to vindicate the Laws of Forfeiture. After taking notice that *the Forfeiture of inheritances is said to be inconsistent with the principles of natural justice*—he asks, why contrary to justice? and admits the answer to be, “That the innocent posterity ought not to suffer for the guilty ancestor.”

“It is not to the purpose,” he continues, “to attempt a justification of any instances,

instances, in which the Laws of Forfeiture may in some countries have been carried to an extremity, as little to be reconciled with principles of policy, as of clemency and justice. Among the *Persians* and *Macedonians*, not only the criminals convicted of treason were put to death, but all their relations and friends. The descendants of *Antiphon*, the Orator, were disqualified from advancing themselves by their own merit to estates and offices in *Athens*. The posterity of *Marius's* faction were excluded by a law of *Sylla* from the same privilege."

He then proceeds as follows:—"When Forfeitures and incapacities of this kind are laid out of the case, what is the force of the answer, as applied singly to the question of estates or rights of inheritance, enjoyed by the criminal himself,

or to be conveyed through him to others? It clearly results into this absurdity; That rights concerning property, manifestly derived, not from Nature (as will be shewn at large), but from the favour of Civil Society, may not be conferred upon such terms as shall bind the possessor to that civil duty, which he owes the state conferring those rights; and, for the breach of his duty, be subjected to Forfeiture.

“ But this is to offer strange violence, both to the constitution of society, and the conclusions of Reason.

“ If we consider accurately the nature of human punishment, we shall find it attended with unavoidable imperfections.

“ How short is our discernment! The surface of things and actions is alone exposed

exposed to our view : The inward thoughts, the habitual temper, which form the greater part of moral conduct, are entirely concealed from us. It is for this reason, that Laws assign the same name, nature, and penalty, to all offences, which bear a conformity in outward resemblance, though intrinsically varying from one another by a thousand circumstances, known only to the Searcher of hearts.

“ How much shorter is our power ! We can estimate the offence more exactly than we can proportion the punishment. In regard to a man’s self, death is the last punishment, which can be inflicted for the most malignant and extensive crimes. But in regard to others, this Power, limited as it is, minutely traced into its consequences, operates perhaps further than we wish ; since in no case can it be

confined to the criminal, without reaching beyond him to some connected with him by friendship, interest, consent, or nature. What is still more, it is not only impossible to disjoin these connections; but, however that were possible, it is even necessary to complicate them. Society was founded on this necessity; it is likewise supported, even whilst it suffers, by it; and when they are thus complicated, whatever happens to one, must be mutual to all. In the instance of a king and his people; a king executes by his subjects, and, in quarrels with foreign states, they suffer various evils, for the weakness or iniquity of his government. In the case of a corporation; the sense of the majority, or of a chosen number, ordinarily determines the body. On account of faults committed in their corporate capacity, their markets, gates, fortifications, harbours, are

are liable to Forfeiture ; and yet many innocent members may suffer in the effect of such Forfeiture.

“ To the first of these cases it will be said, That princes own no superior ; and, therefore, in contests with one another, cannot be separated, for the purposes of justice, from their people. To the second, That though the guilty and innocent members of the corporation are under the same sovereign authority, and might be discriminated ; yet the corporate body cannot be punished for wrong acts, but by the loss of those privileges which extend to all. But, in the case of father and children, the discrimination might easily be made, and justice satisfied : yet the father commits treason, and forfeits that estate, which probably might have descended to his children.

“ It may be answered, in the first place, That this punishment, being a pillar of Society, agreeably to the genius of the whole edifice, is erected on the great principle of society itself; namely, to make the natural and social affections a controul upon irregular and selfish passions. In the next, that nothing is a punishment, which does not affect a right, strictly so called. To make the innocent suffer for the guilty, and to inflict that on the guilty, which, in its consequences, may affect the innocent, are very different and unequal considerations. “ Every thing,” says *Puffendorf*, “ which causes a sorrow or loss; is “ not properly punishment. It is a “ misfortune to be reduced to poverty “ by a crime, which caused the magistrate to set a large fine upon the father of a family; but not a punishment. How many are there, who “ come

“ come into the world without the expectation of a patrimony? How many, who lose all they have by war, fire, or shipwreck ?”——Now, since the children have no right but from the father, if he holds the property till his death, or through him, there is no injury done, when he is justly deprived of that wealth, which was acquired under the protection of society, to be transmitted to his posterity in stated rules of descent by positive institution ; and of those honours which are the rewards of good conduct, the pledges of future faith. These benefits may be considered as the gifts of civil government ; but life and liberty are the gifts of Nature, and should never be taken away because of the parent’s offence : nor should a subject be made incapable of employments, without some crime committed by himself. Such severities are unwise, as well

as unequitable. A difference therefore must be observed between the natural rights and common liberties, which are annexed to the person of every subject, and the peculiar distinctions of society, such as riches and honours. These last are merely contingent; and, if hoped for in the course of succession, depend on the conduct of those ancestors from whom we would derive them. And it is not to be said, men are punished, when these contingent advantages, which themselves neither acquired nor merited, having, by reason of the “civil qualification of their blood” (as a great lawyer * of our own has expressed it), been brought into view by the desert of one ancestor, are intercepted by the crimes of another.”

* Lord Chief Justice *Hale*.

This reasoning, it must be confessed, is so extremely close, that it is difficult to discover an opening, through which controversy may gain a footing.—And yet solid as it seems, if it is founded on an erroneous basis, it will give way to the impressions of truth.

It is certainly true, that the succession to those rights which he calls contingent, depends on the conduct of our ancestors. Riches, for instance, may be squandered; and though, as he observes, to waste a fortune which would have been an honourable support for a man's family, is deservedly esteemed cruel and against conscience, yet no complete provision could be made against that evil which would not be attended with more general inconvenience.

But, with great deference to the Author, there is a material difference between

tween the interposition of Law to prevent a necessary consequence of an ancestor's crime or indiscretion, and the operation of Law in directing an effect, by a positive institution, which would not otherwise have followed.

Certain it is, that society is so constituted, that the innocent must sometimes be involved in the fate of the guilty. It is a consequence which the Law, or, in other words, human wisdom cannot prevent in many cases; and which in some it is not expedient to prevent, for fear of some more general inconvenience.

But it is one thing to be under an incapacity, or to foresee the inexpediency of relieving such as suffer by the faults of others, and another to ordain that they *shall* suffer for such faults, where
they

they otherwise *would not*. In the first instance, the Law is necessarily and wisely *passive*; in the latter, it appears to be *impolitically* and *severely active*.

The learned Writer however observes, that since the children have no right but from the father, or through him; if he holds the property till his death, there is no injury done, when he is justly deprived of that wealth which was acquired to be transmitted to his posterity in stated rules of descent by positive institution. In truth, however, in treason and capital felonies, it is not the offending father, who is deprived of the benefit of his wealth, but his innocent posterity; for when a delinquent is sentenced to death, we cannot seriously say, that it is any punishment to him to be deprived of wealth, which he has but a few days to enjoy.

That

That the stated rules of descent, or the particular modes by which property descends, are of positive institution, may be readily granted, yet the general right of succession is a natural right; and when a delinquent has paid his life for his crime, to exclude his children from their right to his property, is to involve the innocent in the punishment of the guilty.

Our Author however, on the authority of *Puffendorf*, objects, that every thing which causes a sorrow or a loss is not properly a punishment. “It is a
“misfortune,” says he, “to be reduced
“to poverty by a crime, which caused
“the magistrate to set a large fine upon
“the father of a family, but not a punishment.”

But we apprehend, it will be thought partial to apply this to the case of Forfeiture

feiture for treason, felony, &c. if we argue on the footing of this distinction as far as it will hold.

For instance, it must be allowed, that to be reduced to poverty by a crime, for which a large fine is set on the parent, is a misfortune to a child, but no punishment. For if the crime is not of a nature requiring corporal chastisement, justice at least demands pecuniary compensation: and the punishment in this case is immediately to the parent, though it may consequently affect the children. While the father lives, and the child is under an incapacity of providing for himself, he must follow the fortune of the father, for the law cannot separate their interests.

It must likewise be the occasion of sorrow to a child, to be descended from a
6 traitor

traitor or felon, who, having shewn no regard to the Laws of God or his country, is torn from his family by a most shocking and ignominious death; but his suffering is no punishment to his children. Because, in this case, the sorrow or misfortune is a consequence necessarily attending the connection between parent and child, and not arising from any positive institution of Law, therefore cannot be deemed a punishment: for by punishment is generally understood some suffering inflicted by the positive ordinance of a superior power, and not a hardship necessarily or accidentally flowing from the natural relations between persons and things.

Thus far the distinction holds. But this principle is only applicable to confiscations, where the father's life is not taken away, and which are in lieu of
other

other punishment, leaving the connection between parent and child still subsisting. The case is widely different where the Law sentences the parent to death, for there the connection is broken by act of Law; and though their interests may be separated, yet the child is deemed to suffer singly for the guilt of his father: and what can be more rigid and severe, than that the Law, which dissolves the connection, should nevertheless sentence the surviving child to suffer for the crime which the ancestor has atoned for with his life?

Thus in the case of Forfeiture of estates for high treason, the children do not suffer by a necessary consequence of their father's guilt, but by a positive institution of Law, and therefore it is a punishment to *them*. If it is not a punishment to them, to whom is it a punishment?

Not to the father. For in regard to him, death, as our Author observes, is the *last* punishment. Beyond this *ultimum supplicium*, nothing can affect him. Therefore, either Forfeiture is no punishment, which will not be contended ; or it is a punishment to the children.

This reasoning may be applied with regard to the illustration which our Author uses, to shew the necessity of complicating those connected with the criminal in the consequences of his punishment. “ In the instance of a king and his people,” says he, “ his subjects suffer various evils for the weakness or iniquity of his government.—In the case of a corporation, many innocent members may suffer on account of faults committed in their corporate capacity.”

With respect to these political connections however, it may be said, First,
with

with regard to kings and their people, that there is a kind of tacit compact between them : the former undertake to administer the government established for the good of the whole ; and the latter, in return, promise lawful obedience and subjection. If therefore they receive any injury from the weakness or iniquity of their governor, they may, strictly speaking, be said to suffer by their own act. Their evils are necessary and unavoidable consequences of the political connection. And indeed it is the nature of every trust, and an inevitable consequence of social intercourse, that the party confiding must suffer for the mistakes and crimes of the party entrusted. Whereas, in the natural connection between father and son, the evils the latter sustains by the loss of estate, on account of the crimes of the former, do not arise from any unavoidable or necessary circumstances

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cumstances resulting from the connection itself, but are created by the injunction and operation of Law. So far therefore the illustration does not seem apposite.

With regard likewise to a corporate body and its particular members, as there is an impossibility of punishing the corporation, but by the loss of privileges which extends to all, the hardship to which the innocent members are exposed by such loss, is necessarily inherent in the nature of the politic constitution ; because it is impossible for them to retain their privileges, and that justice be done at the same time : whereas, with respect to the natural connection between father and son, the case is widely different ; for the demands of justice may be satisfied by the punishment of the parent, without defeating the child's expectations
from

from the property of his father ; and by destroying these expectations, the Law creates an hardship, not inherent in the nature of the connection.

In few words, in the former instances, they suffer because it is impossible for human policy to prevent or avert their misfortunes; in the latter, they suffer by a positive institution of Law, in a case wherein otherwise they might not suffer at all, and therefore the provision of Law may be considered as a punishment inflicted on them. Our Author says, that “nothing is a punishment which does not affect a right strictly so called;” and he then proceeds to shew, that “the right of inheriting is not conferred by the Law of Nature anterior to Civil Society.”

“ The Law of Nature,” he observes,
“ is used in two senses, either as con-
sisting

sisting of certain regulations absolutely necessary for supporting the purposes of Nature, and constitution of things, previous to all civil compact; or as made up of those conclusions of natural reason, which different states, or civil societies, have generally and uniformly thought fit to establish into Laws, by voluntary consent. The first is the only strict and genuine description of the Law of Nature; and, taking it in that light, it may be said, that although the right of inheriting be known to the Laws of every civilized country, and is founded on the best principles of natural reason, yet it is not a right of Nature, or which can belong to any man in a State of Nature. To illustrate the proposition particularly, let these things be considered: 1st, That the end of property is subsistence, by which end Nature has bounded our pretensions to it, however

civil society may enlarge them. Hence, in a State of Nature, we cannot assume more than we use, nor hold it longer than we live, and are capable of using it. And in this no alteration arises from circumstances of improvement. It is enough, that the thing improved becomes more advantageous to ourselves, and that we pay to Nature the acknowledgments of industry for the liberal profusion of her gifts. 2dly, That the manner of acquiring property, in a State of Nature, is by occupancy; an act of the body, not of the mind; which last, expressed in any other way (until civil Laws had marked out for words or writing a settled operation), would give a title to property too precarious and disputable. 3dly, That in the transferring of property, the consent expressed gives a right to the alienee against the alienor; and occupancy confirms that right against

every one else. But in the case of descent, where is the expression of consent in the alienor? It will be said, that the affection and relation of the deceased will create a presumption of consent. This is carrying the matter very far, to say, that the Law of Nature, in a State of Nature, transfers property by presumption, in like manner as a Civil Law in a State of Society. Where is the occupancy to complete the transfer? That title may accrue to some other more diligent than the heir, unless we will suppose Nature so careful as to keep possession for him. In a word, is it not more rational to say, That transmission by descent, or acquiring by inheritance, is that act of positive and civil Law, which prevents the property of the deceased from reverting, as it would do in a State of Nature, to the common stock? But it may be objected, that this manner
of

of arguing sets the principles of Nature at variance with one another. She expects from every man the nourishment of his children, till they are able to support themselves. If he should die before that period, will she not assist him to complete his views by transferring his property to them? The answer is obvious. Upon the principles here mentioned, Nature points out another way. If he foresees the event of his death probable, he may make *conditional gifts and alienations to his friends, whilst he

* “ The writers on the Law of Nature speak of the right of making donations, *mortis causâ*, (a thing known in the Civil Law) as a right which might subsist in a State of Nature. And for a plain reason, The right of making a gift is a natural right. But if it be made just before the death of the giver, in trust for a particular purpose, the execution of that trust must, in a State of Nature, depend merely on the faith and honesty of the trustee : whereas, in civil society, Laws have provided methods of compelling him to perform it.”

lives,

lives, for the support of his unassisted children. If through chance, or inadvertence, he neglect it, the law of benevolence, that fundamental principle, requires such as are nearest in blood and affection to the deceased, to take upon themselves this care : nay, lays it, in a state of uncorrupt Nature, upon the consciences of those, under whose notice the orphans may fall ; so that Nature has not left this compassionate case unconsidered, unprovided. Yet, suppose that property descends by the Natural Law ; if the children are grown up, and are possessed of what is sufficient for their use, before the father's death, they stand in no need of this succession ; and by that principle which confines property to subsistence, and a capacity of using, they are even barred from accepting it. If they are weak, and unable to maintain themselves, though the property descend,

they

they cannot occupy ; that is, acquire it, or complete that transfer of it, which the presumed affection or will of the deceased, by the operation of the Law, tenders to them. How then are the children better provided for in this than in the other way, reasoning upon the matter as in a State of Nature ?”

Though we must acknowledge these arguments to be very ingenious, we can by no means consider them as satisfactory and conclusive. We will agree, for the sake of argument, with the Author’s definition of the *Law of Nature*, as consisting of certain regulations absolutely necessary for supporting the purposes of Nature, and constitution of things, previous to all civil compact ; but we must beg leave to ask, From whence are these regulations drawn ? Are they not derived from the conclusions

clusions of natural reason? Does not natural reason loudly suggest that children have a right to succeed to their parent's property? And if their right, as the Author admits, is founded on the best principles of natural reason, is it not properly speaking a right of Nature?

To discuss this point with greater precision, however, it may be necessary to recollect the definitions already given of the word *right*. *Grotius* defines it to be “*Qualitas moralis personæ competens ad aliquid jure habendum, vel agendum.*” A moral quality or faculty belonging to a person, intitling justly to have, or to do something. And this he divides into perfect and imperfect; *Qualitas autem moralis perfectæ facultas nobis dicitur, minus perfectæ, aptitudo.* This quality, when perfect, is called faculty, when imperfect, an aptitude.

But

But the definition of *Puffendorf* seems to be more full and precise: *Frequentissimum est, ut accipiat pro qualitate illa morali, qua rectè vel personis imperamus, vel res tenemus, aut cujus vi aliquid nobis debetur.* It is most frequently taken for that moral quality by which we lawfully govern others, or retain possessions, or by virtue of which something is due to us. In another place, he thus defines the right of Nature; *Jus ipsi est libertas quam quisque habet facultatibus naturalibus utendi secundum rectam rationem.* Right is that liberty which every one has of using his natural faculties conformably to right reason.

From this definition it may be concluded, that the right of succession is a right of Nature, and belongs to man in a State of Nature. If right is that moral quality by virtue of which something is due to us; if it is “ that liberty
which

which every one has of using his natural faculties conformably to right reason ;” children certainly have a right of succession to their parents property, which, by the fundamental principles of Nature, is due to them, and which they may, conformably to right reason, use their natural faculties to obtain.

Grotius argues, that the right of succession is naturally derived from the presumption of the parent’s will, abstracted from all Civil Law ; “ For since,” says he, “ the dominion over property is of such extent, that it may be transferred to another by the will of the owner, in case of death, and the possession still be retained, if any one dies without making any declaration of his will, as it is not to be supposed, that his intention was, that his property, after his death, should fall to the next occupant ; it therefore

fore follows, that the property should be deemed to belong to such persons as it is most probable the deceased would wish to possess it; for where a case is doubtful, we must suppose every one to intend that which is most agreeable to justice and equity." And in this principle *Puffendorf* agrees with him.

It is certain, that our natural affections incline us to desire that our possessions should descend to our children and relations. Consanguinity attaches the human affections in so peculiar a manner, that the desire of seeing our own family flourish above others, is innate in us.

We are not only prompted by inclination, but it is our principal duty, to provide for those whom Nature directs us to take care of; and, in the next place, to shew our gratitude to our benefactors.

In

In inheritances, therefore, both by the law of Nature, and the common consent of all nations, children are preferred before all others.

The rights of children to succession are not only supported by the obligation incumbent on parents, who are bound by Nature to nourish and educate their offspring, but are farther sustained by that vehement parental affection, which is never extinguished but by some very enormous crimes committed by the children, or some uncommon ferocity and insensibility in the parent's disposition.

It may be granted, indeed, that the right of *inheriting*, taken in the strict technical sense of the word, is not properly a right of Nature. Right of inheritance, technically defined, is that right which a man's heirs has to inhe-

rit estates in lands or tenements, according to the rules of civil institution. These rules are various in different countries, and in different places of the same country; as appears by the custom of *Gavelkind* and *Burrough English* among us.

But though such rights of inheritance, or, in other words, though the modes of transmitting property by descent, be of *civil* institution, yet the childrens claim of succession to the parent's property is a right of *nature*. The *quantum* of their claim indeed depends altogether upon the parent's discretion. A parent is not bound to transmit his property equally among all his children; he may, without any violation of the Law of Nature, prefer one before another, by reason of his extraordinary affection for one, or on account of excelling merit in one above the rest.

When a parent however dies intestate, and the Civil Laws do not provide otherwise, all the children should, on the principles of natural reason, succeed equally ; because, where nothing appears to the contrary, descendants of equal degree are supposed to have had an equal share in the ancestor's affections.

But, though the measure of their portion depends on the parent's will, yet each, by the Law of Nature, is entitled to such a share as may suffice at least for aliment or subsistence ; by which, as *Puffendorf* justly observes, is to be understood, not only a sufficiency to preserve life, or a bare existence, but such a share as may help to qualify the child for society, and render him fit for the purposes of civil life.

As it is necessary, however, for the support of every established government,
2 that

that the state of property should be adapted to the nature and frame of each civil constitution, we consequently find, that different regulations, with respect to succession, prevail in different states. Many, we may say most states, have instituted the right of primogeniture, by which the estate descends to the eldest son. In some places however, the succession is equally distributed, and in others, as has been said, the right of the youngest takes place.

The right of primogeniture is held to be the most suitable to noble, and the equal succession, to plebeian, families. We may add, that consequently the former agrees best with monarchical, and the latter with republican government. The splendor and security of monarchy consists in the number of noble, opulent, and powerful subjects ; it is therefore

of consequence that patrimonial estates should be indivisible, and devolve entire on the heir of the family, that he may continue the power, and inherit the grandeur of his ancestor, and likewise find it his interest to exert that power for the maintenance of that form of government from which he derives such singular advantages over his relations and fellow-subjects.

On the other hand, it is requisite for the safety and preservation of a republic, that the disparity between individuals should not be so great. No one person, in such a constitution, should attain too great a share of power and opulence, lest his exorbitant riches, and influence, should be employed to the prejudice of the commonwealth, and pave the way to usurpation.

As it can seldom happen, however, that one man can amass such an overgrown property, and retain it long enough to create such a degree of dependance on him as is necessary to favour the views of usurpation, therefore the state wisely provides against such attempts, by throwing the succession open at his death, and admitting his children to an equal share of his possessions.

But though the modes of transmitting property are of civil institution, and of course vary according to the prevailing policy in different governments, yet transmission by descent, or the right of acquiring by succession, is a right of Nature.

I use the word *succession*, as a term of more precision than *inheritance*. When we speak of the right of inheritance,

we perplex the argument, by adopting a phrase more peculiar to rights of civil institution, at the same time that we are engaged in a disquisition concerning rights in a State of Nature: and by this means the dispute turns rather upon the word than the matter.

Inheritance, as has been shewn, is a term of art, signifying the estate which the Law casts upon the heir; and the right of inheriting, as already confessed, is a right depending on modifications of civil institution: but the right of acquiring by succession, is a right of Nature.

The act of Positive or Civil Law does not confer the right of succession, but only modifies that right, as best suits the policy of government; and, moreover, gives the descendant the means of recovering or maintaining that right, so modified.

In

In a State of Nature, it is admitted; there is an obligation on society to acknowledge and support the title of the children to the parent's property: but the Positive or Civil Law makes that a matter of *compulsion*, which, in a State of Nature, was no more than a bare *obligation*.

We may allow of the distinction which the Author takes from the *Roman* Law, and supports by example drawn from our own, that "*Hæres est nomen juris, filius nomen naturæ.*" But I must with deference observe, that the inference he deduces from hence is so far from being just, that it may in fact be turned against, and adopted to prove the contrary proposition.

"If," says he, "the right of *inheriting* be a right of Nature, the name of

an heir cannot be separated from that of a son, but they must stand and fall together, because *jura sanguinis nullo jure civili dirimi possunt*. But against this reasoning," he observes, "we have the authority of two systems of Civil Law. And in the Law of *England*," he adds, "the distinction is clearly made. If a man attainted be murdered by a stranger, the son shall not have the appeal, because it is given to the heir. Yet, if he is murdered by the son, it is held by some great lawyers, that the crime is petty treason, because the relation of a son remains."

The error of this conclusion lies in making use of juridical terms in the discussion of a philosophical subject. *Heir*, it must be admitted, is a name or relation of Law; *Son* is a name or relation of Nature; nevertheless, they may
easily

easily be separated, without impeaching the natural right of succession.

Heir is a civil or political relation, which generally denotes the eldest son of an ancestor—in some places the youngest; or such other person or persons as the civil Institutions of particular countries rank in the degree of succession.

Now the Law of Nature certainly knows no such right of inheriting. Nature gives no one child a preference over another by rules of seniority or post-nativity, &c. but leaves it to the discretion of the parent to make such provision for all his children, as is most suitable to their respective wants, capacities, or merits. And in default of such provision, Nature casts the succession on all equally.

There

There are natural and political rights of succession; and the latter only are, properly speaking, rights of inheritance. An heir, therefore, considered as a person on whom the Law casts the inheritance on the death of the ancestor, in preference to others of equal degree of consanguinity with the deceased: such heir, I say, is undoubtedly a creature of society; and his right of inheriting is by act of positive or civil Law. Consequently the name of an Heir may well be separated from that of a Son, and yet the right of *succession* remain a right of Nature: for the *Law* has made them distinct creatures, as is evident from the rules of our Law, by which, in cases of descent, the right of *representation* takes place of the right of *propinquity*, and the title of the grandson is preferred before that of the son.

But

But though the right of *inheriting*, taken in the appropriated juridical sense of the word, is not a right of Nature, yet Nature does acknowledge and direct a right of succession, by which children have a claim to their parents property. They are brought into existence without any act of their own; and their parents, who gave them being, are bound to provide them with every means in their power to make that being convenient and comfortable. Their claim therefore ought not to be superseded, but by some very flagrant and atrocious act of their own, by which their right is defeated.

The rights of blood are, of all others, most sacred. It is said, *jura sanguinis nullo jure civili dirimi possunt*: but instead of *possunt*, we ought rather to say *debent*; for though it may be urged, that no civil Laws ought to take away such right,

right, yet we find in fact that they can and do.

It is not intended, however, to impeach the established Laws of descent in this kingdom. The rights of primogeniture and representation may be deemed best calculated for the support of our happy constitution, which is, of all others perhaps, most favourable to the general welfare of society.

The right of primogeniture is evidently founded on feudal principles, tho' it was some time before it was fully established; for while the feudal system was weak, the grantor reserved to himself the power of giving the fief to any particular son he thought proper, as most fit to perform the services. And in the more imperfect state of the feudal system, the succession was divided equally among
all

all the sons, as most agreeable to the Law of Nature, and the practice at that time almost universally prevailing in all countries: and indeed Nature seems to give an equal right to all who stand in equal degree of blood.

But though the reasons in behalf of primogeniture, as founded on feudal principles, do no longer subsist, it does not therefore follow that this rule of succession should be abolished; since such a change might probably be thought to have a tendency towards giving such a disproportionate weight to democratic influence, as might tend to the prejudice, if not to the subversion, of our well-framed model of government. Though, on the other hand, it may be urged, that such inconveniencies are not likely to arise, as they may be prevented by settlements.

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With respect to the right of representation, there is much more to be said for it, even on the principles of natural justice, than for that of primogeniture. In the early times, when the notions of men were gross and simple, the right of propinquity was the most obvious claim. The rights of infants were then but little regarded : the uncle had not only nearness of blood to plead in his behalf, but his ability to perform the services of the tenure, gave him a preference over his nephew, according to the policy of the feudal system. But as the rigour of that system relaxed, the representative right gained footing, and was almost generally acknowledged.

The right of representation seems indeed most agreeable to the more enlarged ideas of natural justice. It is a presumption that the uncle is of years and
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capacity to provide for himself, and that he has received benefit from his father's property ; whereas it may be presumed, that the nephew, by reason of his tender years, is incapable of procuring a maintenance for himself, and it would be a grievous circumstance, that besides the misfortune of losing the comfort and support of a parent, he should suffer the additional calamity of being deprived of that property, which he had a right to expect in a course of descent.

It may be thought, however, that it is, on the other hand, a hardship on the uncle, that the nephew should inherit the whole estate to his prejudice. By the *Roman* Law, the nephew only took that equal share, which his father would have been entitled to :—But by the right of primogeniture, the uncle must submit to lose the whole.

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Nevertheless, these different regulations, or modifications, with respect to transmissible property, made by positive or civil institutions, called Laws of Inheritance, do not prove that the right of *inheriting* is not a right of Nature: for, when we consider the subject in the view of a *natural* right, the word *inheriting* must be abstracted from its technical acceptance, and taken in a more extensive sense, as denoting a general right of *succession*. And, viewed in this light, it will appear, that the *heir*, or person on whom the *Law* casts the estate, and the *son*, or child, on whom *Nature* throws it, may be easily separated; and yet the right of inheriting remain a right of Nature.

But if we use the word *Heir* in a general sense, as it ought to be considered in a philosophical discussion, the heir and
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the son are the same, as may be collected from the words of St. *Paul*, in his Epistle to the *Romans*, viii. 17. “For if we are *children*, we are also *heirs*.”

Even the *Roman Law*, which establishes this distinction between *heres* and *filius*, was so sensible of the son's natural right of succession, that it was ordained by that Law, that a Father, who disinherits his son, should express his reasons for so doing, and there were but few allowed valid for this purpose.

The *Roman Law* likewise gave the disinherited child the *Querela inofficiosi testamenti*, in consequence of which the reasons were discussed, which moved the parent to act so much against the principles of natural affection.

Cicero, in his oration for *Sextus Roscius*, when *Ennius* argued, that the father of

Rofcius intended to disinherit him, very properly replies,—“ That it was the business of the accuser, to expose all the failings and vices of the son, which could incense a parent so far, as to induce him to do such violence to Nature, to cast away all that affection which is innate in the mind, and in short to forget that he was a father.”

The learned *Selden*, speaking of the punishment of those who betrayed the *Israelites* to the *Gentiles*, quotes the following passage : “ Ita etiam si quis populi universitatem acrius oppugnaret, eamque contumeliis afficeret, fas erat eum tradere in potestatem gentilium, ut ab eis vapularetur, coerceretur, mulcetur. Non ita si privatum quempiam sic contumeliis afficeret. Nec fas erat bona traditoris diripere, tametsi esset fas personam ejus sic lædere, nam bona ad hæredes

hæredes attinebant." Thus we find, that though the persons of these traitors might be punished, yet their property could not be confiscated; and the reason assigned is, because it belonged to their heirs.

If therefore, in lieu of the natural right of succession, certain civil regulations are established, called Laws of inheritance, with intent to modify and confirm such natural right, children ought not to be sufferers by such civil institutions which should properly have their benefit in view.

The rights of Nature may be modified, but cannot be destroyed: and if by positive act of Law, the children are barred from their civil right, their natural right at least remains, and cannot in justice be withheld from them.

Now it is certain that Nature gives children a claim to their father's property, though it does not ascertain the *quantum* or *modus* of that claim, which, where the parent is silent, is ascertained by civil institutions.

It is not denied, but that, by the dictates of Nature, children have a right to subsistence: now this subsistence, till they are in a capacity of acquiring property for themselves, must be derived from the property of their father.

The manner of acquiring property, it is true, in a State of Nature, is originally by occupancy; that is to say, possession alone gives a right to the first holder of any subject. But it does not follow that, upon every subsequent change or transfer, occupancy is necessary to establish a *Right*; for it is a *Right* of which we are speaking.

To suppose this, would be confounding *Right* with *Possession*. Property, while open, cannot indeed be said to be acquired, till it is in holding, and occupied; but after it has been occupied, a *Right* may be derived to the descendant of the first occupant, though the possession may accrue to another.

The right of the descendant may either arise from the conditional gift or alienation of the ancestor, or from presumption, by reason of the affection and relation of the deceased.

If the child, by reason of infancy, or other impediment, is under an incapacity of occupying, whoever acquires the occupancy, must, according to the dictates of natural justice, take it with the burthen of providing for the child: for it is not less a precept of Nature than a

maxim of Law, that *qui sentit commodum, sentire debet et onus*.

The presumption of the ancestor's consent giving a right to the descendant's claim, is by no means carried too far. Our Author himself acknowledges, that, "If the father, foreseeing the event of his death, neglects to make conditional gifts and alienations to his friends for the support of his unassisted children, the Law of Benevolence, that fundamental principle, requires such as are nearest in blood and affection to the deceased, to take upon themselves this care :—nay, lays it," he adds, "in a state of uncorrupt Nature, upon the consciences of those under whose notice the orphans may fall : so that Nature," he concludes, "has not left this compassionate case unconsidered, unprovided."

Here

Here, it being admitted that conscience supports the claims of orphans, it may be asked, where is the occasion of occupancy? and where is it necessary to complete a presumed transfer in favour of the child?

“That title,” says he, “may accrue to some other more diligent than the heir, unless we suppose Nature so careful as to keep possession for him.” And where would be the extravagance of such a supposition? What is Nature in this sense, but another word for Conscience? What are the dictates of Conscience, but the suggestions of Nature?

But it should be remembered throughout, that the question is about the children's *right* of succession: and though we should admit, that, in a State of Nature, a title by *occupancy* may accrue to

some other more diligent than the *heir*, yet the right of the *heir*, or, to speak more properly, of the *child*, remains, though he be under a disability of acquiring possession: and it is, or ought to be, the principal intent of all Civil Laws, to secure and maintain the possession to him who has the natural right.

If the child, on the other hand, at the death of the father, is in a condition to occupy, it is a presumption, that being resident on the spot, and best acquainted with his father's property, he will be ready to use the vacant subjects, before any other occupant can seize them.

To this, however, it is objected, that the child may have acquired property apart from his father, and that the end of property being subsistence, no one, in a State of Nature, can assume more than he can use.

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This objection has, in part, been answered already in the foregoing essay. To consider it further, however, it may be necessary to recur to the original, and even fictitious State of Nature, and briefly to trace the progress of improvement, previous to all civil compacts: for it is reasonable to suppose, that men made gradual advances towards improvement, before they arrived at that perfection which taught them to enter into social confederacies under civil compacts and institutions.

In this first supposed state of mankind, we can scarce conceive any property which was in its nature transmissible. If we conclude, according to this hypothesis, that men at first lived on the spontaneous produce of the earth, in this rude state, no property could be transferred, but by gift, to take effect immediately ;

diately ; and men were directed by the compassionate feelings of Nature, to provide sustenance for children, who were unable to procure it for themselves.

If we suppose hunting and fishing to have been the next stage of improvement, neither does this state afford us any idea of transmissible property. To this savage state, if we conclude, as some have conceived, that of pasturage to have succeeded, in which men derived their support from the cattle they possessed, the idea of property then became somewhat more enlarged, as by its nature it was then transmissible ; and it is reasonable to conclude, that the children, who were employed with their father in taking care of the cattle, possessed the stock when he died.

Both the last stages of life however were probably erratic. Property was as
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yet moveable in its nature, and men had no fixed abodes.

But in the next stage, when agriculture had happily cultivated the land, property became immoveable, and men gained fixed and settled habitations. Ideas of property now began to ripen and expand, and its purposes became more extensive.

In the prior stages of life, indeed, the end and purpose of property seems to have been little more than that of subsistence ; but in this it must be supposed that the views of our forefathers were somewhat more enlarged, and that they proposed other ends from the fruits of their labour and industry than the enjoying a bare subsistence.

The principles of natural affection move parents to wish and provide for
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the happiness of their children, not only while they are in being, to be witnesses and participators of their felicity, but even after their deaths ; and this principle directs them to furnish all the means requisite for these affectionate purposes : consequently the idea of transmitting property for the benefit of their children, would occur as soon as ever they were in possession of property of a transmissible nature.

This idea would be more strong and extensive, when such property became immoveable ; for when property became in its nature immoveable, men applied themselves to the business of improvement with greater earnestness, and were no doubt encouraged in their labours, by the prospect of transmitting the subjects so improved to their children.

The derivative rights of children therefore may be considered as co-eval with the exercise of transmissible property; and though occupancy was the original title, yet, by a tacit Law of Nature, the Children of the first occupant might claim a derivative title to the benefits of his property.

They have a right founded in conscience; they have been educated on the spot, they are become familiar with the possession, and have probably contributed to its improvement. Add to this, that it must be presumed to be the wish and intention of their parents, that they should succeed to the possession.

It is natural for them, therefore, to challenge and claim the vacant subject, and every consideration drawn from natural reason seems to exclude the title of
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a casual occupant, and to proclaim him an intruder. And if, by infancy or otherwise, the children are unable to occupy, whoever takes the possession, takes it, as has been said, as a trust in conscience for the benefit of such children.

It seemed necessary to trace the most probable accounts of the progress of property, in order to shew that the arguments, which the Writer draws from the condition of property in a State of Nature, do not apply to the merits of the present question.

Let us consider a State of Nature as abstracted from all hypothesis, and in such a state we must admit a kind of property of a transmissible nature; for we can have no conception of civil institutions to regulate the modes of transmitting property, without first supposing
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a species of property in itself transmissible.

Property, therefore, being transmissible in a State of Nature, the right of transmitting it must have resided in the proprietor. Civil institutions did not confer the right, but prescribed and enforced the modes of carrying that right into effect.

The proprietor then having a right to transmit, to whom should he make such transmission? We need not study for an answer: for there is one immediately dictated by the heart, which seems to chide our enquiry, and point out the children as the natural objects of affection.

If he makes no declaration of his will, to whom should the succession devolve?

Grotius, and *Puffendorf*, in the passage above quoted, have answered this question. They both agree that the children's right of succession is naturally derived from the presumption of the parent's will, abstracted from all Civil Laws: and in this they speak the language of Nature.

“ If,” says the former, “ one dies without making any declaration of his will, as it is not to be supposed, that his intention was, that his property, after his death, should fall to the next occupant, it therefore follows, that the property should be deemed to belong to such persons, as it is most probable the deceased would wish to possess them. For,” says he, “ where a case is doubtful, we must suppose every one to intend that which is most agreeable to justice and equity.”

Now

Now, it is the undoubted duty of every one to do what is most agreeable to justice and equity. And every duty which one man owes to another, begets a right in him, to whom it is due, to expect and demand the discharge of the obligation. For a right, as has been shewn, is “that quality, by which we may lawfully retain possessions, or by virtue of which something is due to us.”

To contend, therefore, that the right of succession is not a right of Nature, but something conferred by civil institution, is to deny the obligation of those reciprocal duties, which result from the natural relations of mankind. It is giving countenance to that pernicious principle, which some Pagan sophists adopted, and which Plato has admirably refuted:—that is, That justice, honour, and all the social virtues, are the crea-

tures of Art, not of Nature : and that right is founded on power, than which there cannot be a more dangerous doctrine. *

From what has been said, it may perhaps be concluded, That a State of Nature, such as the Writer speaks of, is merely hypothetical :—That, admitting such a state, there is no kind of property in it, which is in its nature transmissible, and that therefore it is no proper illustration :—That the idea of transmitting property arose so soon as property was of a transmissible nature ; and that the derivative rights of children accrued from that moment :—That the right of succession, being a right of Nature, it cannot be justly destroyed by any civil institution ; and consequently, that the Laws of Forfeiture, as extended to the children of the delinquent, are against
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the Law of Nature, as they destroy a natural right.

I say, as extended to the children; for it would be absurd to argue, that the Laws of Forfeiture in general are against the Law of Nature. They are, in some cases, extremely just and necessary. In all enormous delinquencies, for instance, where the delinquents are not punished with death, it is strictly agreeable to reason and justice that they should forfeit their property. Here the reasoning of the learned Writer applies in its full force: for, in this case, “there is no injury done to the delinquent, when he is justly deprived of that wealth, which was acquired under the protection of society.” But when he is sentenced to lose his life, and has undergone the *ultimum supplicium*, it is not the criminal,

as has been observed, who is deprived of his wealth, but his children, who had a natural right to expect it after his death.

INTRO-

INTRODUCTION

TO THE

FIRST EDITION.

IN the rude state of Nature, when power was thought to confer right, every man must have been under apprehensions from his neighbour. To remove those apprehensions, and to provide some security for the weak and timid, against those of superior strength and intrepidity, was certainly the end of all social confederacies.

While societies however were merely federative, mankind retained their rational right of private revenge; but when they became legislative, it was absolutely necessary for the order and support of government, that certain offences should

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have their stated measure of punishment.

It was requisite, for this purpose, to frame certain established rules, or laws, by which the members of the community were to regulate their conduct with respect to each other; and those rules, or laws, were made with the consent, either tacit or express, of the whole body.

In the infant condition of legislation, the laws by which different states were regulated, were few and simple. Mankind, at first, had more to apprehend from violence than from deceit; and consequently to protect the lives, liberties, and property of the subject from open force, must have been a concern antecedent to the thought of securing him against circumvention.

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In the maturer state of society, as mankind grew more polished and refined, artifice took place of force, and evil and designing men studied to accomplish those ends by subtlety, which they were prohibited from attempting by violence.

As laws multiply with offences, those of a criminal nature must necessarily have increased with the growing craft and perfidy of men. The same subdolous disposition in mankind, likewise, gave birth to that variety of Civil Laws, which have been framed to bind men to the rules of honesty and equity, in the course of their social commerce with each other.

In the forming these laws or rules of action, men had only to consult the dictates of Nature, which immediately pointed out to them what was just and what was unjust.

But instead of being directed by that unerring guide, the Light of Nature, (which *Solomon* emphatically calls, *the candle of Almighty God*) many states have framed their systems of government in such a manner, as to induce the necessity of supporting such systems by laws, to which the natural rights of mankind are sacrificed.

The *Britons*, the *Romans*, the *Saxons*, the *Danes*, and the *Normans*, all contributed in their turns to form our original code of laws. The increase of commerce and riches, and the various revolutions of government, made it expedient at different periods, that the laws should be varied, modified, and improved for the public good. But many of those alterations and intended improvements, especially in our Criminal Laws, were made (as lord *Bacon* expresses it) on the
spur

spur of the occasion, and were therefore not sufficiently attended to in their original formation. The obvious disproportion and severity in our Criminal Laws, have long called for the calm and deliberate revifal and confideration of the legiflature. The lovers of their country, and friends of human nature, muft all wifh for fuch alterations in this branch of our laws, as may, confiftent with reason, juftice, and the principles of the conftitution, moderate their rigour, and reform the morals of the people by wife regulations *à priori*; for laws which only take effect *à pofteriori*, and propofe the prevention of crimes, by cutting off the delinquent, do not go deep enough for the purpofe of reformation; whereas prudent provifions to correct the morals, and proper punifhments that counteract the principles of criminality,

nality, will have sure and lasting effects. Without such provisions, we may be making perpetual alterations and corrections, but we shall in vain expect any salutary effects; we shall resemble those patients who are always taking physic, but will not alter their bad diet and intemperate modes of living.

I am well aware of the supposed difficulties which may attend the discovering and suggesting the several amendments, proper or safe, to be made in our Criminal Laws; but if it is allowed, that the reformation of those laws is now become necessary, the importance of the subject will encourage those who have a proper regard for the interest of society to attempt it.

Lord *Coke*, in his Epilogue to his third Institute, which treats of the Crown
Law,

Law, after observing that frequent punishment does not prevent crimes, says, “ What a lamentable case it is, that so many Christian men and women should be strangled on that *curfed tree of the gallows* ; infomuch as if in a large field a man might see together all the Christians that but in one year, throughout *England*, come to that untimely and ignominious death, if there were any spark of grace or charity in him, it would make his heart to bleed for pity and compassion !”

His lordship then proceeds to shew, that the method of preventing crimes is, “ first, by training up youth in the principles of Religion, and habits of industry. Secondly, in the execution of good laws. Thirdly, in the granting pardons very rarely, and upon good reasons.” He then concludes, “ that the

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consideration of this prevention, were worthy of the wisdom of parliament, and, in the mean time, expert and wise men to make preparation for the same, *ut benedicat eis dominus*. Blessed shall he be that layeth the first stone of the building, more blessed that proceeds in it, most of all that finisheth it, to the glory of God, and the honour of our king and nation.”

The old treatises on our Crown Law have, in some instances, suggested amendments, but few of them seem to have considered the principle, *that Criminal Laws should not regard punishment so much as prevention*. Several modern writers on our criminal Laws, have indeed insisted on the truth of this proposition, without pointing out the means proper to be pursued, in order to apply
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this principle in reforming our Criminal Code.

The Author of *Principles of Penal Law* hath, however, with great learning and ability, established and explained this and several other leading principles of Penal Law; and having, at the end of his treatise, declared, that he was convinced, a reformation in our Criminal Code, is neither impracticable, unsafe, nor difficult; he subjoins a proposal for that purpose, which cannot be better explained than in the learned Author's own words.

“ The *British* constitution is the pride of every *Briton*: to secure, to fortify, to perpetuate that excellent system of government, is the business of every *Briton*. It may be pardonable therefore in me to point out what I conceive to be
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the best method of accomplishing the reformation in question; leaving the execution of that method, or the adoption of a better plan, to those who lie under the more immediate engagements both of interest and duty.

The learned observer on the ancient statutes, was certainly well founded, in suggesting that a reformation of the *English* law can never be effectually carried on, without the assistance of able lawyers, not members of the legislature. With such assistance it might perhaps be easy to frame separate, declaratory statutes relative to each class of crimes, comprehending all the descriptions and degrees of each crime, with their proportionate punishments. Every such declaratory statute should be attended by a supplemental bill, repealing all prior provisions relative to the class of crimes in that
statute

statute contained. It seems superfluous to point out the many collateral good effects which might arise from this method of seeking the end proposed.

The repeal of particular statutes, without such preparatory caution, will be found a mere palliative remedy, which may tend indeed to abate the symptoms of the disease, but from which a radical cure cannot be expected.”

Several Authors of great abilities, who have wrote on the subject of Criminal Laws, agree that the Penal Codes of most nations are very defective; particularly with regard to capital punishments. Among others, the Marquis of *Beccaria* seems to have considered this subject with great attention.

This humane author has concluded his admirable *Essay on Crimes and Punishments*

ments (which his commentator compares to one of those few remedies, which, in medicine, is capable of alleviating our sufferings) with this position, "That a punishment may not be an act of violence of one, or of many, against a private member of society, it should be public, immediate, and necessary, the least possible in the case given, proportioned to the crime, and determined by the laws."

In his chapter on the punishment of death, after having insisted that this punishment is not authorized by any right, and that it is neither necessary nor useful in any state, except when the state is in danger, he concludes as follows :

" I am sensible that the voice of one philosopher is, by much, too weak to be heard amidst the clamours of a multitude, blindly influenced by custom: but
there

there is a small number of sages scattered on the face of the earth, who will echo to me from the bottom of their hearts; and if these truths should happily force their way to the thrones of princes, be it known to them, that they come attended with the secret wishes of all mankind; and tell the sovereign, who deigns them a gracious reception, that his fame shall outshine the glory of conquerors, and that equitable posterity will exalt his peaceful trophies above those of a *Titus*, an *Antoninus*, or a *Trajan*. How happy were mankind, if laws were now to be first formed, now that we see on the thrones of *Europe* benevolent monarchs, friends to the virtues of peace, and to the arts and sciences; fathers of their people; though crowned, yet citizens, &c."

The laws made by the sovereign authority, as well in criminal matters as in

civil, should certainly be calculated with a view to preserve the lives, liberties, and properties of the subjects. This view is best answered by consulting the happiness of individuals, by providing for their subsistence, and establishing and promoting good habits among them. The most effectual way to ensure the order and harmony of the community, is to establish wholesome moral institutions; for such is the infirmity of human nature, that the wisest men act more from habit than reflection; how much more powerfully then must this principle operate among the vulgar?

The necessity of laying the foundation of political order in moral rectitude is so strong, that it seems surprising how the idea could arise, that the immorality of an act is not so much to be regarded as its bad tendency to society. Nothing is more

more certain, than that every immoral act hath such bad tendency; for immorality is the root of all political evil, and an immoral man cannot be a good citizen.

Moral habits, however, are not to be enforced by Penal Laws; they are to be inculcated by moderation and good example: but the principal means of making virtue habitual, is to sow the seeds of it in early education.

When we consider how many are totally deprived of the benefit of education, who are nursed and brought up in the midst of poverty, indolence, and vice, instead of being surpris'd at the multitude of criminals, we shall rather wonder that their number is not much greater.

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The review of our criminal punishments affords a most melancholy prospect to the benevolent mind. The number of criminals, who are deemed to perish like brutes for slight offences, and the frequent instances of innocent persons having been deprived of life in the most ignominious and terrible manner, must sensibly affect all who have any consideration for the safety and welfare of society.

Legislators, in framing Penal Laws, should not forget, that criminals are their fellow-creatures; that their crimes have been chiefly owing to their unequal lot in society, their want of proper education, and the bad habits they have contracted in their tender years; and that the same unhappy situation might have possibly reduced themselves to the deplorable state of the unhappy criminal.

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This essay is intended to evince the necessity of moderating the rigour of our Penal Laws, and establishing a more just and equitable proportion between crimes and punishments.

With this view, I have endeavoured to shew, that extreme severity in punishment leads to licentiousness and impunity; that men of mild dispositions, being unwilling to punish severely for slight offences, are averse to prosecutions, and delinquents are suffered to continue in the habit of evil, till, at length, they are guilty of enormous crimes, which might have been prevented by taking proper cognizance of their first advances to guilt.

With respect to punishments in general, I have likewise endeavoured to shew, that the apprehension of death is not a

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sufficient motive of terror; that the strongest objects of dread to men of depraved minds, are poverty, labour, and confinement; that these evils therefore, which they commit crimes to avoid, should be inflicted on them in proportion to their several degrees of delinquency; and that the example of suffering guilt held up to the criminal, would have much better effect than the terror of immediate death; which, instead of being useful, is in most cases pernicious to society, and ought not to be inflicted but under particular circumstances.

However I may have succeeded in supporting those propositions, I am most firmly persuaded that the establishment of more just and moderate punishments, not only in capital, but in subordinate offences, would be attended with the most salutary effects.

It was under this firm persuasion that I have been led, in some parts of this Essay, to speak in a manner which may perhaps be thought rather too decisive, upon the impropriety of our present Code of Criminal Laws. I have, however, availed myself of the authority of very respectable authors, both ancient and modern, in support of the propositions I mean to establish.

I presumed that it would not be unreasonable at this time to offer some hints on the subject of revising and reforming this branch of our laws; as the House of Commons have already come to some resolutions upon that head.

The present period, indeed, seems, from many concurring circumstances, to encourage this undertaking.

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The general character of the age is strongly marked for its benevolence and moderation.

The sovereign on the throne exhibits a bright example to his people of those and other virtues : May future ages celebrate his reign as the æra when our Penal Laws were moderated, and more equal punishments instituted.

There is, too, a peculiar turn for reformation in the present parliament, who have lately passed two acts, making essential improvements in the law relating to elections and privilege of parliament.

Add to this, that the seats of judicature were never filled with judges more able or more ready to give their assistance to so benevolent an undertaking.

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As all are interested in the welfare of their fellow-subjects, all therefore should co-operate in their different departments to effect the salutary purpose of moderating the injustice and rigour of punishments, which deprive society of a citizen, instead of endeavouring to reclaim the guilty and repair the injured; and to procure such laws to be framed, as may enforce the principles of moral justice and virtue; and, by the prudent correction of slight delinquencies, may prevent the commission of more enormous crimes, and make effectual provision for the peace and good order of society.

N O T E S

O N

V O L U M E I.

PAGE 2, line 4. *As many definitions which have been given of Law, do not seem to be sufficiently just and comprehensive, I shall therefore venture, &c.]* As I have taken the liberty of giving a definition of the word *Law*, very different from many learned authors, it is certainly incumbent on me to offer my reasons for supposing the former definitions to be improper or imperfect.

I am truly sensible that it is much easier to discover defects than to amend them: and perhaps the definition which I have proposed may likewise be found defective.

I shall

I shall therefore proceed, with the utmost deference, to lay before the reader my inducements for differing from many respectable writers, in defining what is Law.

And first, *Cicero* defines Law to be the distinction betwixt justice and injustice. “*Est lex justorum injustorumque distinctio.*” *Cic. de Leg. l. 2.* But does not this definition appear to be too general, and to be rather a definition of *Reason* than of *Law*?

Bracton says, “Law is a just statute, ordaining what is right and honest, and prohibiting the contrary.” “*Lex est sanctio justa, jubens honesta, & prohibens contraria.*” But this definition is in substance nothing more than a copy of *Cicero*’s conclusion in his definition of the Law of Nature. “*Lex naturæ est ratio summa insita in hominis natura, quæ jubet ea quæ facienda sunt prohibetque contraria.*”

To these definitions it may likewise be objected, that they seem to be rather definitions of

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of a particular species of Law, than of the word *Law* in general, which comprehends the Law of Nature, the Divine Law, and the Human Law, with all their various subdivisions.

Sir *Henry Finch* defines Law to be, “*an art of well ordering a civil society.*” Sir *Henry’s* definition seems, however, to be more unexceptionable than his derivation. In enumerating the several etymologies which have been given of the word Law, he says, in *Greek*, Law is called Νόμος, απο το νέμειν, *a distribuendo*; because it gives and distributes right to every one. In *Latin*, he adds, it has also its name *Lex*, not *a ligando*, as some would have it; although Law indeed be *vinculum civitatis*, nor *a legendo*, which is *to read*, though he says that pleases *Braetton* most; but as he that best could tell (meaning *Cicero*) derives it *a legendo*, which is *to choose*, because of the choice and excellent wisdom in it.”

But

But is not this rather a forced derivation, and does not the word *Law* seem to be rather derived *a ligando*, than *a legendo*? For one of the essential properties of Law, is the obligation it imposes on every member of society to observe its injunctions; and where there is no obligation there can be no Law. Till it has acquired the power of an obligation, it seems to be no more than a *precept*, *advice*, or *recommendation*, which every one is at liberty to follow or not, as his private judgment directs.

Lord *Coke* says, somewhat pleasantly, that Law is *rectum*, as it discovers that which is crooked and wrong: and he makes an enumeration of the qualities incident to the Law, in which he amplifies *Bracton's* definition, and is consequently open to the same objection.

The definition of *Grotius* seems to come nearer to the true meaning of the word *Law*. He describes it to be a rule of moral conduct, obliging men to do what is right. “*Regula actuum moralium, obligans ad id quod rectum est.*”

est." These words, however, seem rather to define the Law of Nature only, and not what is Law in the abstract.

To this definition *Puffendorf* objects, that by making Law refer to right, he supposes the latter antecedent to the former, whereas, in truth, Law creates the rule of right.

Puffendorf defines Law in general to be a decree, or statute, by which some superior obliges those in subjection to him, to regulate their actions according to his precepts. "In
" genere autem lex commodissime videtur de-
" finiri per decretum, quo superior sibi sub-
" jectum obligat, ut ad istius præscriptum
" actiones suas componat." *Puff. de Jure
Nat. & Gent.*

This definition does not differ much, in substance, from that given by *Hobbes*, in his Dialogue between a Philosopher and a Student, where he says, "A Law is the com-
" mand of him or them, that have the sove-
" reign

“reign power given to those that be his or
 “their subjects, declaring publicly and
 “plainly what every of them may do, and
 “what they must forbear to do.”

But these definitions seem liable to this objection, that they rather define a particular species of Law, than the word Law in general. Law, generally considered, is neither the rule or statute prescribed, but the faculty which makes those rules and statutes.

These definitions appear to be further imperfect, as they describe Law to be a rule or statute prescribed by *some superior* indiscriminately. Now it is not sufficient, that the power be superior, unless it be likewise lawful: and there is a very material difference between usurpation and right.

These definitions, however erroneous they appear, assist greatly in the investigating and framing a definition which is submitted to be more full and comprehensive than any of those mentioned in this note.

Page 20. parag. 2d, 3d, 4th, and 5th.—
We are not to imagine, that the condition of the first of our kind was so wretched and miserable as described by Lucretius, Horace, and Virgil, &c.] It must be confessed, that the description which *Tacitus* gives of the *Fenni*, a people in *Germany*, falls little short of the imaginary one painted by the poets.

Fennis mira feritas, fœda paupertas, non arma, non equi, non penates; victui herba, vestitui pellis, cubile humum. Sola in sagittis spes, quas inopiâ ferri ossibus asperant. Idemque venatus viros pariter, ac fœminas alit. Passim enim comitantur partemque prædæ petunt. Nec aliud infantibus ferarum, imbriumque suffugium quam ut in aliquo ramorum nexu contegantur. Huc redeunt juvenes, huc senum receptaculum. Id beatius arbitrantur, quam ingemere agris, allaborare domibus, suas alienasque fortunas spe metuque versare. Securi adversus homines, securi adversus deos, rem difficillimam assecuti sunt ut illis ne voto quidem opus sit. Tacit. de more German.

We learn too from good authority, particularly from the account of the Voyages undertaken for making discoveries in the southern hemisphere, and from other accounts which may be depended on, that there are now many nations who appear to live in a state somewhat analogous to that of the *Fenni*: and it is not a little surprising, that some philosophers of ingenuity and integrity have not scrupled to prefer such a savage state to all the refinements of society. Among others, the celebrated *Rousseau* seems to have favoured this strange opinion, which has been well ridiculed by Mr. *Palliot*, in a Comedy called *les Philosophes*, in which one of the characters is facetiously introduced crawling upon all fours; and made to utter the following sentiments:

Je ne me régle plus sur les opinions,
 Et c'est là l'heureux fruit de mes reflexions,
 Pour la philosophie un gout a qui tout cede,
 M'a fait choisir expres l'état du quadrupede:
 Sur ces quatre pilliers, mon corps se soutient mieux,
 Et je vois moins de fots, qui me blessent as yeux,
 En nous civilisant, nous avons tout perdu,
 La santé, le bonheur, & meme la vertu.

Je

Je me renferme donc dans la vie animal
 Vous voyez ma cuisine, elle est simple & frugale.

[*Montrant une laitue de sa poche.*]

On ne peut, il est vrai, se contentera moins,
 Mais ja'i sçu menrichir, en perdant mes besoins,
 La fortune autrefois, me paraissait injuste,
 Et je suis devenu plus heureux, plus robuste,
 Que tous ces courtisans, dans le luxe amolis
 Dont les femmes en fin connoissant tout le prix.
 Revenu de l'accueil que vous faites aux sages,
 Madame je venais vous rendre mes hommages
 Inviter ces Messieurs, peut etre a m'imiter
 Du moins si mon exemple a de quoi les tenter.

But, in truth, considering mankind even in their most savage state, there will yet be found a very wide difference between them, and the *mutum et turpe pecus*, fighting *propter glandem et cubilia*. Even in the most uninformed savages, we find the *communes notitiæ*, the practical principles of virtue, though their application of those principles is often extremely unnatural and absurd.

Page 35. line 8. *But Puffendorf argues farther, that we are not to consider the natural*

state of man, &c.] The passage in the original is as follows :

“ Est porro et hoc probe observandum, hic agi non de statu naturali animantis, quod solo impetu et inclinationibus animæ sensitivæ degatur, sed cujus pars præcipua, et cui in cæteras facultates, regimen sit ratio. Et istius rationis usum legitimum haud quidquam excludere, sed potius cum aliarum facultatum operatione conjungere debet, qui statum naturalem hominis est rite designaturus. . . Cum manifesta accedat utilitas pacis, ad quam ratio revocat, non potest non naturaliter homo ad pacem inclinare. . . Præsertim cum postea si quando neglecta ratione affectibus obtemperarit, ex eventu deprehendat se deteriora secutum. Ex quibus omnibus concludimus, naturalem hominum statum, etiam extra civitatis considerationem, non esse *bellum* sed *pacem*. Quæ hisce fere legibus constat ut quis alterum non laceffentem non lædat, suisque quemvis bonis frui patiatur, ac si quæ convenerunt fideliter præstet, ac libenter aliorum commodis promoveat, quantum per
arctiores

arctiores obligationes licet. Cum enim status naturalis hominis usum rationis includat, non potest quoque aut debet ab eo separari obligatio, quam ratio subinde ostendat. Et quia quislibet homo in se ipse deprehendere potest, bonum sibi esse si ita se gerat ut aliis hominibus benevolis, potius quam infensis utatur: propter naturæ similitudinem facile præsumere potest, alios quoque paria sentire. Ac ideo male circa designandum eundem statum præsupponitur, homines saltem periosque ductum rationis quam natura supremam actionum humanarum directricem constituit, negligere: adeoque male status naturalis vocatur quem neglectus aut abusus principii maxime naturalis producit."

Page 50. line 1. The passages in this and the following paragraph are in the original as follows:

Jura inventa metu injuste fateri necesse est,
 Tempora si fastosque velis evolvere mundi,
 Nec natura potest justo se cernere iniquum
 Dividit aut bona diversis, fugienda petendis.

Hor. l. 1. Sat. 3.

The note is.—Naturaliter enim cognoscimus quid nobis sit bonum, utile, jucundum, quid contra malum, et adversum; at non ita quid iustum, quid iniustum.

Page 61. lines 15, and 20. The two passages here alluded to in *Cicero's Offices*, are as follows :

“ Sic enim cogitans---Est *isthuc quidem honestum, verum hoc expedit*, res a natura copulatas audebit errore divellere : qui fons est fraudum, maleficiorum, scelerum omnium.”

“ Socratem solitum execrari eos, qui primum hæc natura cohærentia, opinione distinxissent.”

Page 67. line 5. *No actions are in themselves obligatory or unlawful, until they are made so by some Law.*] The words of *Puffendorf*, in lib. 2. cap. 3. § 4.—are :

“ Nullos actus in se esse debitos aut illicitos, antequam per legem tales fiant.”

And.

And this position, he says, he has shewn in
B. I. c. 2. § 6.

Page 75. line 5. *Civil Laws therefore cannot alter or abrogate the Laws of Nature, &c.*] *Cicero* hath given the noblest testimony for our purpose, as it is cited out of his books, de republica, lib. 3. by *Lactantius*, lib. 7. c. 8.

“ Est quidem vera lex, recta ratio, naturæ congruens, diffusa in omnes, constans, sempiterna, quæ vocet ad officium jubendo, vetando, & à fraude deterreat.—Huic legi neque abrogari fas est, nec derogari ex hac aliquid licet, neque tota abrogari potest. Neque vero aut per senatum aut per populum solvi hac lege possumus. Nec est quærendus explanator, aut interpret ejus alius.”

The wisest indeed, among the ancient writers, all agree in the acknowledgment of the Law of Nature, and that it derived its source immediately from *God*, the author of Nature.

Plutarch de Auditione—says, Ταυτὸν ἐπὶ τὸ
ἐπεσθαι Θεῷ καὶ τὸ πείθεσθαι λόγῳ.—To follow
GOD, and to obey *reason*, is the same thing.

Sophocles, in speaking of the Laws of nature in his *Œdipus*, Act 3. p. 187. Ed. H. Steph. calls these,

————The lofty laws,
Derived from heaven, and high Olympian *Jove*,
And not the mean device of mortal men.

————νόμοι υψίδες, &c.

Page 75. line 9. *Grotius*, &c.—*That the Laws of Nature would be obligatory, though we should grant, &c.*] The words of *Grotius* in the original are as follows :

“Hæc quidem, quæ jam diximus, locum aliquem haberent, etiamsi daremus, quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotia humana.” *Grot. de Jur. Bell. & Pac. in the Prolegomena.*

Page 76. *Puffendorf*'s words are, “Ratio-
nis dictata nullo modo possunt habere vim
legis,

legis, quæ necessario superiorem ponit." Puff. de Jur. Nat. & Gent. lib. 2. c. 3.

Page 78. line 3. *That moral sensation which we call conscience, and which according to the learned Selden, &c.]* The words of *Selden* alluded to in this paragraph are :

"Ob eo nempe violata ad quorum observationem, ex obligatione, quam ita vocabant, naturali qualiscunque ea fuerit, seu, ut Christiani dicimus, ex nexu conscientiae, seu conscientiae foro, ei qui violarat, proprio esset adstrictus." Seld. de Jur. Nat. & Gent. vol. i. p. 108.

The happiness attending the consciousness of having done well, and the disquiet of mind which arises from the recollection of evil actions, are well described by *Seneca*, in treating of Anger.—By *Xenophon*, in his *Apomnem.* lib. 2.—By *Marcus Antoninus*, lib. 10. c. 4.—and by *Tully*, in his epistle to *Atticus*, lib. 9. ep. 12. where, speaking of a profligate wretch, he says,—*Ulciscentur illum mores sui.* His own practices will be revenged upon him.

Tacitus,

Tacitus, Ann. 6. c. 6. says of *Tiberius*, His own crimes and villanies were by his conscience turned into the greatest punishments to him, and it was not without reason that the greatest master of wisdom used to affirm, that could we open the hearts of tyrants, we should discover the strokes and wounds of guilt: the body not being more cut and tormented with stripes, than the mind is with cruelty, lust, and ill designs.

Cicero de Finib. lib. 1. cap. 16. says.— If there be any who think themselves sufficiently guarded and secured against the discovery of men, yet they dread the majesty of the gods: and judge all those cares and disquiets, which night and day prey upon their minds, to be sent from heaven, as a present punishment for their crimes.

Montaigne's Essays, lib. 3. c. 2.—It is certain, I know not how to express the satisfaction that we enjoy in ourselves by well doing, nor the generous joy that accompanies a good conscience. A mind courageously vi-
cious

cious may provide for its security at all adventures, but it cannot arm itself with self-pleasure and satisfaction. It is none of the least comforts, that it finds itself free from the infection of a corrupt age, and can say in itself, if any man could look into my breast, he should not find me guilty of troubling or ruining any man, neither of revenge, nor envy, nor breach of the public Laws, nor of innovation, nor sedition, nor ill-language; and though the licentiousness of the time allows and instructs every man, yet I have not put my hands to the goods or purse of any man, nor eat of any man's bread but my own, either in war or peace, nor made use of any poor man's labour without reward or wages. These testimonies of our conscience are pleasing, and it is our benefit that this comfort is natural, and the only recompence which never fails. To expect the reward of virtuous actions from the commendations of men, is an uncertain and troublesome foundation, particularly in an age so corrupt and ignorant as this, &c.

The

The advantages too arising from the practice of virtue, is finely described by the last-mentioned author as follows :

Montaigne's Essays, lib. 1. ch. 25.—Virtue is not as the schoolmen represent her, placed on the top of a steep mountain, rough and inaccessible. They who have approached her, on the contrary, find her seated in a fine fertile and pleasant plain, from whence she beholds all things subject unto her ; the way to her is easy, and if we labour to find her, our path lies through shady and green roads, sweet, flourishing, and pleasant ; of an easy and smooth ascent, like that of the celestial arch.—The price and excellency of true virtue consists in the ease, pleasure, and profit of the practice. The difficulty is so little, that an infant may exercise it as well as a man, and the simple as well as the wise ; discretion and temperance are its chief instruments, and not force or waywardness. *Socrates*, her chief favourite, voluntarily and without compulsion, walked in ease and innocency

nocency in her pleasant paths. She is the nursing mother of all human pleasures; by rendering them just and upright, she purifies and refines them; by moderating them, keeps them in breath and appetite; by retrenching those she refuses, she makes us more eager after what she allows us, and she allows us all things that are suitable to our nature plentifully, to satiety, at least, if not to weariness, like an indulgent mother; unless we will say that a regimen of sobriety and temperance is an enemy to pleasure. If a common misfortune befalls her, she can make her escape, or pass through it, and makes another fortune not less fleeting and transitory. She knows how to be rich and powerful, and lies in beds of roses. She loves life, beauty, fame, and health, but her peculiar office is to teach us to use these goods regularly, and to know how to lose them freely; an office, much more noble than severe, without which the whole course of our lives is unsocial, turbulent, and deformed, and may be justly called full of rocks, thickets, and monsters.

Montaigne

Montaigne also, in his 3d Book, c. 2. describes vice as follows :

“That is not vice, really vice, which offends not, and in a true judgment does not accuse, for there is such an apparent deformity and inconvenience in it, that they speak with reason who say that it is principally produced by stupidity and ignorance, so hard is it to know it and not hate it. Malice sucks up the greatest part of its own venom, and is poisoned with it. Vice leaves an ulcer in the flesh, and repentance in the soul, which always frets itself ; for tho’ reason extinguishes almost all other griefs and sorrows, yet it begets repentance, which is so much the more grievous, because it is bred within : as the cold and heat in fevers is always more sharp than that which outwardly affects.”

I am well persuaded, that the reader will excuse my inserting these excellent passages from *Montaigne*, which indeed contain many sentiments which we find in the ancient writers.

Page 79. l. 2. Grotius *defines it to be the dictate of right reason, pointing out the moral turpitude or moral necessity of any action, &c.*]

The words of *Grotius* in the original are :

“Jus naturale est dictamen rectæ rationis indicans actui alicui, ex ejus convenientia aut disconvenientia cum ipsa natura rationali, inesse moralem turpitudinem, aut necessitatem moralem, ac consequenter ab Auctore Naturæ Deo, talem actum aut vetari aut præcipi.” Grot. de Jur. Bell. & Pac. lib. i. cap. i.

Page 79. par. 3. *Puffendorf* makes several objections to these definitions.

Page 80. par. 2. To that of *Grotius*, *that it still remains obscure, &c.*] *Puffendorf's* words are :

“In obscuro manet, quinam sunt illi actus in se illiciti, & quo judicio ab aliis actibus liquide internoscantur.”

“Nullos

“Nullos actus ob se esse debitos aut illicitos antequam per legem tales fiant.” Puff. de Jur. Nat. & Gent. lib. 2. c. 3.

And as to par. 1st, p. 80. his words are :

“Neque enim ratio proprie loquendo est ipsa lex naturæ, sed medium quo rite usurpato illa cognoscatur.” Puff. de Jur. Nat. & Gent. lib. 2. c. 3.

Page 80. par. 2. *Puffendorf's* definition of the Law of nature is as follows :

“Illa est quæ cum rationali & sociali naturâ hominis ita congruit, ut humano genere honesta & pacifica societas citra eandem constare nequeat.” Puff. de Jur. Nat. & Gent. lib. 1. c. 6.

Page 83. par. 2. The words of *Grotius* in this definition are :

“Jus est qualitas moralis personæ competens ad aliquid juste habendum vel agendum.” Grot. de Jur. Bell. & Pac. lib. 1. c. 1.

Page

Page 83. par. 3. *Puffendorf's* definitions are as follows :

“Frequentissimum est ut accipiatur pro qualitate illa morale, qua recte vel personis imperamus, vel res tenemus, aut cujus vi aliquid nobis debetur.” *Puff. de Jur. Nat. & Gent. lib. 1. c. 6.*

“Libertas quam quisque habet facultatibus naturalibus utendi secundum rectam rationem.” *Idem, c. 6.*

Page 87. par. 2. *The use of this universal right, says Grotius, supplied the place of property, &c.]* The words in the original are :

“Talis usus universalis juris erat tum vice proprietatis, nam quod quisque sic arripuerat, id ei arripere alter nisi per injuriam non poterat.” *Grot. de Jur. Bell. ac Pac. lib. 2. c. 2.*

Page 88. par. 1. *Cicero's* words are :

“Quemadmodum theatrum cum commune sit, recte tamen dici potest ejus eum
VOL. III. I locum,

locum, quem quisque occuparit: sic in urbe mundove communi non adversatur jus quo minus suum quidque cujusque est.

“Sunt autem privata nulla naturâ, sed aut veteri occupatione, aut qui quondam in vacua venerunt, aut victoriâ, aut lege, pactione, conditione, forte.”

Page 96. line 1. Grotius *says, that every man might seize as much as he could to his own use.*] The words in the original are:

“Quisque hominem ad suos usus arripere posset quod vellet.” Grot. de Jur. Bell. & Pac.

Page 99. line 11. *Where the father is silent, he is supposed, as Grotius observes, to have intended that which is most just and equitable.*] The words in the original are:

“Creditur autem in dubio id voluisse quod æquissimum atque honestissimum est.” Lib. 2. c. 7.

attineant, Igitur non ita necessarium videbatur, ut dominium in se contineret facultatem disponendi quid circa res alicujus post mortem debeat fieri. Sed sufficere poterat, si quis suæ potestati res subjectas haberet, quousque viveret, nec eam ultra vitam extendere possit." Puff. de Jure Nat. & Gent. lib. 4. c. 10.

Page 105. line 1. *That it is vain to make dispositions concerning property, &c.] Puffendorf's words are :*

"Citra hoc vana erat dispositio, quod tueri auctor non posset, reliqui qui poterant, nolent." Puff. de Jur. Nat. & Gent. lib. 4. c. 10.

Page 107. par. 2, and 3. The different parts of *Puffendorf* here alluded to run in the original as follows :

"Nemo facile adseruerit juri naturæ repugnare, ut quis possit de suis rebus dispo-
nere, eo tempore quo dominus est, et effectum
conferre

conferre in tempus quo futurus dominus non fit; ita ut hoc ex dominii natura necessaria aliqua ratione resultet, haud quidquam adparet." Puff. de Jur. Nat. & Gent. lib. 4. c. 10.

"Nihil prohibet quo minus quis dominium rei suæ in alium possit transferre, recepto tamen sibi certo in eam rem jure quoad in vivis fuerit." Idem.

"Non tam de hujusmodi ultimis dispositionibus quæstio est, quam de illis testamentis, quibus quis ita de rebus suis disponit, ut libertatem tamen ea mutandi ad ultimum spiritum retineat, utque hæredi demum a morte testatoris jus in ipsius bona incipiat nasci." Idem.

Page 108. line 18. *If we consider a testament as Puffendorf defines it, &c.] Puffendorf's words are:*

"Declarationem voluntatis nostræ circa successores in bona nostra post mortem nostram; quæ tamen ante mortem pro libitu

nostro sit mutabilis & revocabilis, & ex qua aliis demum ab excessu nostro jus nascatur." Puff. de Jur. Nat. & Gent. lib. 4. c. 10.

Page 110. Puffendorf *observes, that he can scarce conceive how a son can deserve disinheritance or death, &c*] The words in the original are:

" Etsi vix videam qua ratione exheredationem aut mortem mereri queat filius, in tali ætate constitutus in qua ipsi a parente naturaliter *alimenta* debeantur." Idem, c. 11.

Page 128. parag. 2. It has been supposed, that in a state of primitive community of goods, there is no difference between the gifts of Nature, and the fruits of industry.—That he who cultivates a field, or a garden, has no more right to the products of it than a stranger.—And in like manner, that he who makes a spade, mattock, or any other implement of husbandry, has no exclusive right to the use of it.—*Principes de Droit Naturel*.

This opinion, however, does not appear to be founded in reason.—There can be no

primitive community, but of the gifts of Nature; and every one has, by Nature, an exclusive right to the products of his own art and industry. It has been shewn, that men in a State of Nature had a right to retain as many vacant subjects as they could acquire, and no one could dispossess another of what he had so acquired, without doing him injustice. If no one could deprive another of the gifts of Nature, much less could he claim the products and inventions of another's art and industry. When it is said, there is no property in a State of Nature, this is only true while the gifts of Nature lie open, and no one has made any acquisition or election: but the subjects which one has taken possession of—much more those which he has invented, are his property.

Page 159. parag. 2. *Many writers indeed seem inclined to the opinion that Juries are to determine upon the Law, as well as the Fact.*] Lord Chief Justice Vaughan, in *Busbell's Case*, p. 150, reports as follows:—"But upon all general issues, as upon *Not Culpable* pleaded

in trespass, *Nil debet* in debt, *Nul tort*, *Nul disseisin* in assize, &c. though it be a matter of law whether the defendant be a trespasser, a debtor, disseisor, &c. in the particular cases in issue; yet the jury find not (as in a special verdict) the fact of every case by itself, leaving the law to the court, but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicatedly, and not the fact by itself; so as, though they answer not singly to the question, what is the law? yet they determine the law in all matters where issue is joined and tried in the principal case, but where the verdict is special."

In another part of the same report it is likewise said, "That the jury are to be determined in their verdict by their own knowledge and understanding; for that a man cannot see by another's eye, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning: and therefore that though the verdict be right, yet, if the
jury

jury are not convinced it is so from their own understanding, they are forsworn *in foro conscientiae*."

Page 159. parag. 3.—*These words imply that the DETERMINATION is in the Jury, after having received the proper ASSISTANCE from the Judge.*] Lord Chief Justice Hales does not in the passage mentioned in this paragraph express himself with his usual perspicuity, but seems to be of opinion that Juries are to determine upon the Law as well as Fact. "The Judge (he says) *assists* the Jury in determining points of law," (which word *assists* implies the right of determination to be in the Jury,) "and also (he adds) very much in investigating and enlightening the matter of fact, whereof the Jury are judges." Now the word *whereof* may at first seem only to refer to matter of fact; yet, taking the sense of the paragraph altogether, and considering the use of the copulative, it may be taken to refer both to *law* and *fact*.

But

But the true meaning of this passage is best explained by Lord Chief Justice *Hale* himself, in the 4th paragraph of page 159.

Page 169. parag. 2 and 3. As the business of government became more and more complicated, magistrates and legislators became more and more respected.—In process of time men came to entertain an idea of political, as well as of natural and social capacities. Experience taught them, that such as served the public by their superior abilities and industry were intitled to pre-eminent distinctions. As the concerns of life grew more various, the business of legislation and jurisprudence became studies of more importance. Extraordinary attention and application, and great talents, were requisite to discharge the principal duties of magistracy. In consequence of which, many honourable distinctions and privileges were annexed to the several departments of government.

Page 175. parag. 2. *The jurisdiction of this court, &c.*]

By

By the presence of the justices of the King's Bench, the power of all other justices in the county is superseded ; but such justices may nevertheless proceed by virtue of a special commission.

A person illegally committed to prison by the King and council, the Lord Chancellor, or any other magistrate, may be bailed in the King's Bench ; and in some cases, the court may bail on legal commitments.

Page 206. parag. 3d. *Those who are of opinion, that Punishments are to be referred to commutative justice, &c.]*

Grotius supposes, in favour of commutative justice, that there is something in crimes and punishments in the nature of a contract. For a seller, says he, without any express declaration, is bound to perform every thing naturally incident to the sale : so every delinquent, by his criminality, seems voluntarily to subject himself to punishment. For as he must be sensible, that heinous crimes
cannot

cannot be committed with impunity, consequently it is his intention to deserve punishment (1). To this argument *Puffendorf* answers, that though a delinquent who knows the penalty of transgression cannot complain that he is doomed to punishment, yet no one can be properly said to have directly and immediately consented and bound himself to punishment, since every offender hopes that he shall avoid or elude it by concealment or otherwise (2).

Puffendorf likewise objects to the opinion of Vasquius, who thinks that delinquents are bound to undergo punishment, because penal laws, or at least the powers of legislation, proceed from the consent or convention of the citizens (3).

The several passages in the original are as follows :

(1) Atque hac in re est aliquid quod ad contractuum naturam accedit : quia sicut qui vendit, etiamsi nihil peculiariter dicat, obli-

gasse se censetur, ad ea omnia quæ venditionis sunt naturalia, ita qui deliquit, sua voluntate, se videtur obligasse pœnæ, quia crimen grave non potest esse non punibile, ita ut qui directe vult peccare, per consequentiam et pœnam, mereri voluerit." Grot. lib. 2. c. 20. § 2.

(2) " Si quis sciat delicto alicui pœnam constitutam, & tamen sponte id admittat, eum de injuria sibi illata non posse queri. Verum ideo haud quam recte dicitur, aliquem in pœnam suam directe & immediate concessisse, cum nemo delictum admittat, quin simul speret, sese latendo, aut alia ratione, pœnam declinaturum." Puff. lib. 8. c. 3. § 5.

(3) " Ex inde delinquentes suo consensu ad pœnam ferendam obligari contendit, quod utique leges etiam pœnales sunt quædam conventio civium, aut quod saltem potestas legislatoria ex conventionione civium proveniat." Vasq. Controver. Illustr. lib. 1. c. 28.

To this opinion of *Vasquius*, *Puffendorf* answers, That Laws are not properly conventions.

tions.—That the obligations arising in consequence of any crime is, to repair the wrong done, not to undergo punishment.—That the right of demanding reparation belongs to the injured; and that the obligation of making recompence is incumbent on the wrong-doer, which is a branch of commutative justice. But he adds, as every crime is a deviation from Law, the magistrate has a right of exacting punishment; yet, nevertheless, the delinquent is under no obligation voluntarily to undergo punishment.—That consequently, in this respect the exacting punishment does not square with commutative justice. Upon the whole he says, that punishments do not belong to commutative or distributive justice; but that they are more properly to be referred to justice in general (4).

Puffendorf, however he may have invalidated the opinions of his opponents, does not seem to have sufficiently supported his own.—And, notwithstanding the arguments he has advanced to the contrary, it may still be urged, that punishments are, or ought to be

be, directed by the measure of distributive justice. He insists, that crimes are to be considered by themselves, (that is abstractedly) and such punishments adapted as are most necessary for the publick good, and that it is not necessary to consider the proportion between crimes.—This reasoning we have endeavoured to answer from the last paragraph of page 207 to the end of the 3d section.

Puffendorfs words above alluded to, are as follows :

(4) “ *Leges pacta aut conventiones non esse . . . ex delicto oriri obligationem propriam dictam ad damnum fartiendum, non autem ad pœnam sustinendam . . . In læso est jus ad postulandam damni reparationem, in lædente obligatio ad pensandum damnum. Id quod ad justitiam expletricem spectat . . . Sed quatenus delictum est aberratio a lege, in rectoribus civitatum est potestas pœnam convenientem exigendi; sed in delinquente nulla est obligatio ad pœnam ultro explendam. Quo intuitu pœnarum exactio ad justitiam expletricem*

expletricem non quadrat. Quæ cum ita sint, nihil aliud restat, quam ut dicamus ad neutram justitiæ speciem pœnas pertinere; sed easdem peculiari specie justitia temperari." Puff. Ib.

Page 209. line 6. *The legislator does not consider the crime by itself, but examines it with reference to other offences, and regulates his Punishments according to distributive justice.]*

It is evident, from many instances in our Law, that punishments are directed by distributive justice. In cases of theft, for example, if the value of the thing stolen exceed twelve pence, the crime is capitally punished; here it is evident the crime is not considered by itself, as it affects society: for with respect to society, the theft only, the *animus furandi*, is to be taken into consideration, and not the value of the thing stolen, which wholly concerns the injured individual.

Parag. 2. *It is essential to observe, &c.]*

The words in the original are: "Il est essentiel que les peines aient l'harmonie entr'elles, parcequ'il

parcequ'il est essentiel que l'on evite plutôt un grand crime qu'un moindre." *L'Esprit des Loix.*

Page 210. par. 2. *Many have considered the ends of punishment only under a twofold division, &c.] Aristotle only takes notice of the amendment of the delinquent, and retribution to the injured, without regarding the exemplary nature of punishments.*

Page 212. par. 2. *Grotius divides the different ends of punishment into three distinct species of utility, &c.] The words in the original are :*

" Aut utilitatem ejus qui peccavit, aut ejus cujus intererat non peccatum esse, aut indistinctè quorumlibet." Grot. lib. 2. c. 20. § 6.

Page 213. par. 2. *Where wickedness is incorrigible, the juster opinion is, that it is better for the delinquent not to exist any longer.] The words in the original are :*

“ *Et si irremediabili malitia laboranti, melius aliqui judicent ut plane non sit.*” Puff. lib. 8. c. 3. § 10.

Page 220. par. 1. Criminal jurisdiction is by some supposed to have been of later date than civil; which, nevertheless, appears to be doubtful.—It was certainly a long time before criminal jurisdiction was acknowledged and established in any degree of perfection, more especially with respect to personal injuries. The privilege of revenge, as is observed in the Historical Law Tracts, was, no doubt, unwillingly surrendered, and is not yet totally wrested from individuals; as is evident from the too frequent appeals still made to the sword. But is it not reasonable to conclude, that in the infancy of legislation, the disputes even about property, which are supposed to have been determined by the civil jurisdiction, arose from some attempt of violence, or from some criminal fraud, as theft, &c.? In that light, such disputes may be more properly considered as subjects of criminal
juris-

jurisdiction; which, therefore, seems to have been prior to that which was purely civil. They who deem the former to have been of subsequent date to the latter, seem to have been led to this opinion by considering criminal jurisdiction as restrained merely to the cognizance of personal injuries; which, cases of murder excepted, were probably the last offences in which it interposed its authority.

We may observe, from what remains of the Laws of the most ancient nations, that they chiefly relate to crimes, and such crimes as are most common among a barbarous people; as theft, murder, rapes, rapine; in a word, all kind of wrongs committed by violence: and the Laws (if they deserve that name) of the savage nations at this day, all regard such offences as are committed by violence.

It likewise appears, from many undoubted authorities, that the ancient legislators of

Greece made the Criminal Laws their first object of attention. The *Areopagus* was the most ancient tribunal of Greece, and was instituted by Cerops for the cognizance of murders. Originally, the *Areopagi* took cognizance of all sorts of homicides; but afterwards their jurisdiction was confined to murders committed with premeditated design. A few ages after the *Areopagus*, another tribunal, called *Delphinium*, was erected to try those who confessed the homicide, but justified it. Afterwards the *Palladium* was established, where they were tried who committed an involuntary murder.

Page 222. par. 2. Every Law is an appeal to the reason and judgment of the people governed, and will receive reverence and efficiency only, in so far as it corresponds with their sentiments.

Page 231. par. 2. *That the right of punishment in civil society cannot justly be extended beyond the limits which reason prescribes to private revenge in a state of Nature.*] The Author of the Historical Law Tracts observes,

“ That resentment, when confined within due bounds, is authorised by conscience. The delinquent, says he, is sensible that he may be justly punished ; and if any person, preferably to others, be intitled to inflict the punishment, it must be the person injured. Revenge, therefore, he concludes, when provoked by injury, or voluntary wrong, is a privilege that belongs to every person by the Law of Nature ; for we have no criterion of right or wrong more illustrious than the approbation or disapprobation of conscience : and thus the first Law of Nature respecting society, that of abstaining from injuring others, is enforced by the most efficacious sanction.”

It is well observed in the Commentaries on the Laws of *England*, B. iv. that the right of punishing crimes against the Laws of Nature, as murder, and the like, is, in a State of mere Nature, vested in every individual; and that the first murderer, *Cain*, was so sensible of this, that we find him in *Genesis*, chap. iv. ver. 14. expressing his apprehensions, that *whoever* should find him would slay him.

Page 240. par. 2. Cicero, *speaking of the Rights of Nature, which, he says, are not founded on opinion, but innate in us, &c.*] The words of *Cicero*, as quoted by *Grotius*, are as follows:

“Vindicatio est per quam vis et injuria, et omnino omne quod ab futurum est defendendo aut ulciscendo propulsatur.”

I cannot find this passage in *Cicero*; so that I should suppose it must be misquoted.—And, indeed, it seems to be rather inaccurate to say, that *Revenge is that by which we repel injuries*

juries by revenging. This is only substituting a fynonymous expression instead of a definition.

Page 250. par. 1. *How many revolutions have taken place, &c.*] The opposition to the erection of turnpikes, to inclosures, to the wheel act, and several other useful regulations, are remarkable instances of this kind.

Scotland likewise furnishes us with examples of this nature. The country was once so open, that they were obliged to pass Acts of Parliament for the planting of trees, raising of hedges, and making inclosures; these regulations were most vigorously opposed by the ignorant and uncivilized people of that time; so that the legislature found it necessary to make it felony to destroy the erections. Both parts of the united kingdom, however, now feel the benefit of these improvements.

Page 275. par. 2. *It is wrong, in such cases, to judge from our own feelings, unless we could put ourselves in the place of the criminals, who are the objects of our consideration. Men, who are capitally guilty, are such as are generally tired of life in the manner they hold it; and who therefore commit crimes to better their condition, or put an end to their being. They generally make their advances to the wickedness they intend to perpetrate, with the view of this alternative before their eyes; and consequently the terror of death hath not sufficient influence to deter them from their desperate resolution.]*

Shakespeare, that excellent judge of human nature, describes the situation of such wretches in the following speeches of the two murderers in *Macbeth*. The first says,

I am one

Whom the vile blows and buffets of the world
Have so incensed, that I am reckless what
I do, to spite the world. ———

The

The second adds,

And I, another,
So weary with disasters, tugg'd with fortune,
That I would set my life on any chance,
To mend it, or be rid on't.

Again, in his Play of *Measure for Measure*, he has represented the hardened criminal, as
“ a man that apprehends death no more dread-
“ fully than as a drunken sleep; careless,
“ reckless, and fearless of what is past, pre-
“ sent, and to come; insensible of mortali-
“ ty, and mortally desperate.” It is well
observed by the Author of *Principles of Penal
Law*, that the crimes of such a man may per-
haps have made him unfit to live, but he is
certainly unfit to die. The safety of the com-
munity, and the preservation of individuals,
may call for his execution; but the bosom
of Humanity will heave in agony at the idea,
the eye of Religion will turn with horror from
the spectacle.

Page 276. par. 1. This is an observation
of *Montesquieu's*; whose words are,

L'ex-

“ L’experience fait remarquer, que dans les pays ou les peines sont douces, l’Esprit de Citoyen en est frappé, come il’ est ailleurs par les grandes.” *L’Esprit des Loix.*

Page 278. par. 2. *Montesquieu’s* words here alluded to are as follow :

“ Il seroit aisè de prouver que dans tous ou presque tous les états d’Europe, les peines ont diminué, a mesure qu’on s’est plus approché, ou plus éloigné de la Liberte.” *L’Esprit des Loix.*

Page 304. par. 2. *Montesquieu’s* words are,

“ Les vols sur le grands chemins estoient communes dans quelques états, on voulut les arreter, on inventa le supplice de la Roue, qui les suspendit pendant quelque tems. Depuis ce tems, on a volé comme auparavant sur les grands chemins.” *L’Esprit des Loix.*

Page 306. par. 2. *If we do not rival our forefathers in hospitality, we exceed them in charity.*

charity. *If we are inferior to them in valour, we surpass them in moderation.*]

The ancient hospitality of our forefathers, so much applauded by some Authors, seems to have been a necessary consequence of the dependance of the Vassals on the Lords, according to the principles of the Feudal System. The great men were obliged to keep open-house for their *Retainers*; but they to whom they thus extended their hospitality, cannot properly be considered as their *guests*.

If it be objected, that valour does not come properly under the consideration of the state of Morals; it may be answered, that by valour, in this place, is meant, the spirit of public defence, which is a moral duty.

Page 310. par. 1. & *seq.* The progress from *Self-Love* to *Social*, is most elegantly described by Mr. *Pope*, in the following lines:

“ God loves from whole to parts; but human soul
Must rise from individual to the whole.

Self-

Self-Love but serves the virtuous mind to wake,
 As a small pebble stirs the peaceful lake ;
 The center mov'd, a circle straight succeeds,
 Another still, and still another spreads ;
 Friend, parent, neighbour, first it will embrace ;
 His country next ; and next all human race :
 Wide, and more wide ; the o'erflowings of the mind
 Take ev'ry creature in, of ev'ry kind ;
 Earth smiles around, with boundless bounty blest,
 And Heav'n beholds its image in his breast."

Pope's Essay on Man, Ep. iv. v. 361, & seq.

The learned Author of the *Enquiry into the Life and Writings of Homer*, upon the subject of Morals, expresses himself as follows :

" Many Moralists enter so deeply into one passion or bias of human nature, that, to use the painter's phrase, they quite overcharge it. Thus have I seen a whole System of Morals founded upon a single pillar of the inward frame ; and the entire conduct of life, and all the characters in it, accounted for, sometimes from *superstition*, sometimes from *pride*, and most commonly from *interest*. They forget how various a creature it is they are painting

painting; how many springs and weights, nicely adjusted and balanced, enter into the movements, and require allowance to be made for their several clogs and impulses, ere you can define its operation and effects.”

Page 313. par. 3. *Mankind, under civilized governments, are not to be led by violence. The sense of shame, when used with caution and discretion, is a better instrument of government, &c.]*

The learned Author of *Principles of Penal Law*, in treating of infamous punishments, advises “Legislators to remember that the stamp of ignominy is intrusted to their disposal; and that they should, therefore, use, with œconomy and discretion, this best instrument for the promotion of Morality, and the extirpation of vice.” He observes, that “Shame loses its effects, when it is inflicted without just and cautious distinction; or when, by the wantonness of oppression, it is made familiar to the eye. The sensibility of the people, under so extravagant an exercise of

power, degenerates into despondency, baseness, and stupidity: their virtue is of forced extraction, the child of fear, with all the meanness of the parent entailed upon it. The tranquillity of such a state, says *Montesquieu*, is the mournful silence of a city, which the enemy is about to storm.”

Page 321. par. 2. *By punishing slight offences with extraordinary rigour, we inure men to baseness; we plunge them at once into the sink of infamy and despair; from whence they seldom fail to rise capital criminals, &c.]*

By Stat. 11 and 12 W. 3. it was enacted, that all and every person and persons, who should be convicted of any theft, and should have the benefit of clergy allowed them, instead of being burnt in the hand, should be branded in the most visible part of the left cheek, nearest the nose. This punishment was, however, found to be so far from answering the purpose for which it was intended, that the Legislature found it necessary to repeal it, by a Statute in the fifth year of the reign

of Queen *Anne*; the preamble of which, after reciting the 'clause before mentioned, says, "That it has been found by experience, that the said punishment hath not had the desired effect, by deterring such offenders from the further committing such crimes and offences; but, on the contrary, such offenders being rendered thereby unfit to be intrusted in any honest and lawful way, become the more desperate."

NOTES

O N

VOLUME II.

BOOK III. CHAP. I.

IT will not be improper here to say something of appeals or accusations for *Treason*, as they appear in the ancient authors of our Law.

We shall begin with *Glanville*, l. 14. c. 1. the most ancient of them all, who lays it down for a rule, that “Admittitur autem ad hujusmodi accusationem, quilibet liber homo major infra etatem constitutus;” which I suppose ought to be read, “Major *vel* infra etatem constitutus,” or else I cannot apprehend it to be sense: and afterwards he says,

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L

“Ruficus

“ Rusticus quoque admittitur,” by which I conceive he means a villain, but a woman he excludes as not capable to be an accuser in any felony, except in some special cases. And with this does *Bracton* fully agree, who says, “ Ad accusationem vero hujus criminis admittitur quilibet de populo, liber homo et servus et minor infra etatem constitutus, dum tamen accusatus attachietur usque ad etatem accusantis;” which is a condition that *Glanville* speaks not of, but very likely to be the received law of that time and long after; for in the 17 *Ed.* IV. fo. 2. in appeal by infant, the suit was continued till the plaintiff came of full age, and in the mean time the defendant to remain in prison. Though in 27 *H.* VIII. 11. this being cited by *Portman*, it was said, that the law was altered in that point, and the practice otherwise. But then he adds, “ Dum tamen sit ille qui accusat integrâ famâ et non criminofus, quia criminofi ab omni accusatione repelluntur ut si accusans fuerit latro cognitus vel utlagatus vel aliquo genere felonix convictus aut convincendus:” and afterwards he excepts “ con-

spiratores

spiratores & crimini consentientes." And with this also *Fleta*, l. 1. c. 21. and *Britton*, c. 22. do seem to agree.

It appears by the same authors, that he that appealed another of treason ought, immediately after the fact committed, to repair to the King, or (ad aliquem regi familiarem) by which I suppose *Bracton* means some of his council, and to acquaint them with it; and that he ought not to lodge two nights, nor stay two days, in any one place, nor hardly to look back, till he came into the King's presence; and if he concealed it so long a time, "infra quod ob sui defectum possit regi periculum evenisse," then the defendant might plead it in bar to the appeal, unless the plaintiff could shew a lawful cause or impediment why he could come no sooner.

I find nothing in *Glanville*, as to the judges before whom Treason shall be determined; but *Bracton* writes thus: "Et tunc videndum quis possit et debeat judicare, et sciendum quod non ipse rex, quia sic esset impropriâ

querelâ actor et judex, in judicio vitæ, membrorum, et exheredationis, quod quidem non esset si querela esset aliorum; item justiciarii? non: cum in judiciis personam domini regis, cujus vices gerit, representat; quis ergo judicabit? videtur, sine prejudicio melioris sententiæ, quod curia et pares judicabunt ne maleficia remaneant impunita, et maximè ubi periculum fuerit vitæ et membrorum vel exheredationis, cum ipse rex pars actrix debeat esse in judicio.” And to the like purpose *Fleta*. But *Britton* more expressly, “En cas où nous sommes partie volons que nostre court soit juge sicome Counts & Barons en temps de Parliament.” So that, according to their opinion, Treason could not be tried but in Parliament, though it was not long after that the Law came to be taken otherwise; for in Tr. 4 E. III. Rot. 9. one Howel brought an appeal against *William de Skaldesford*, for that he, together with *Roger Mortymer*, had caused the death of the King’s father, and though the court did not proceed to try him, yet it was not for want of jurisdiction in respect of the crime, but because

cause the defendant pleaded that the fact was committed in *Wales*, and out of their jurisdiction in respect of place, and was therefore discharged.

Process in Appeal. It seems by the case last cited, that when appeals of Treason became triable in the King's court, that if the fact upon which the appeal was grounded were done out of the kingdom, it was not triable there; from whence we may conclude, that it ought also to be laid in the proper county, though I have not seen any express authority to warrant it, since it is not to be presumed that the Law was held any otherwise in appeals of Treason, than in appeals of other felonies.

In the first place, the appellant was to find sureties, if he were able, to prosecute his appeal; but if he were not able, his own oath was sufficient, lest otherwise the difficulty of finding pledges might discourage the meaner sort from accusing others of so great a crime; this being done, there went out an attachment against the person appealed, according

to *Glanville*, to find bail for his appearance, or else to stand committed; though *Bracton* says expressly, he could not be bailed but by the King's writ, unless he appeared *gratis*, and then he was to find no sureties at all, "nisi iudicium ei incumberet," which words are obscure, and I can understand them no otherwise than thus, unless he were convicted by outlawry or of some other felony. When the defendant appeared, then day was given to both parties to come into court, at which court either party might be effoined, according to *Glanville*, though since that time the law hath been taken to be otherwise, as appears by the statute, *De effoigniis calumniand.* and *Britton*, fo. 40; and when both parties appeared, then the plaintiff was to declare upon his appeal.

In the count or declaration, the plaintiff was to set forth the particular fact of which he accused the defendant, with all its circumstances, as also the time and place where the fact was committed, and to charge him with it upon his own view and knowledge,
and

and not upon the relation of any other, and then to conclude in this manner, “Et hoc paratus est verificare per corpus suum prout curia regis consideraverit.”

When the plaintiff had declared, the defendant was to answer; which if he refused and stood mute, or demanded his clergy, and would say nothing else, he was to be adjudged to his penance: as *Britton* says, and as it is clear the Law was taken to be then and long after, both in appeals and indictments, though of later times the practice hath been otherwise. But if the defendant would answer, he had liberty to plead either to the abatement of the appeal, as that it wanted year, day, or place, or misnomer, or want of form, or false *Latin*, or the like, as he might have in any other action: or else, he might plead in bar of the appeal, of which the Law allowed several pleas; as that,

The plaintiff had confessed felony, or had been arrested and imprisoned for felony, or

had broke prison, or was outlawed or attainted :

Or that the defendant had never been in company with those with whom he was accused to be confederate :

Or that the plaintiff had concealed the felony so long time, “ *quod interim posset (si ita est) domino regi periculum imminere, et ideo in appello suo audiri non deberet, tanquam inimicus et traditor domini regis et consentiens feloniae :*”

Or that the appellant had been in the King’s presence, or his court, and had access to the King, or might have had if he had pleased, and had revealed nothing of it :

Or that he had been before the King’s justices in like manner :

Or that the appellant did not know the defendant from other persons when he was in their company :

Or

Or that the appeal before the justices did vary from the appeal before the Coroner, if the court did not find out the truth upon examination. *Britton*, 41. From whence we may gather, that in his time appeals of Treason might be commenced before the Coroner, and tried before the Judges, which is contrary to what *Bracton* held.

And upon these pleas the parties, as I suppose, might join issue, if they were denied, and try them by a jury; in which, if the verdict were given against the plaintiff, his appeal was quashed; and if against the defendant, he had liberty to answer over, because this was the law in like cases, though as to this the old books are silent.

But in case the defendant had none of these exceptions, or would not make use of them, then he had nothing to plead but to deny the fact, and all the particulars of it word by word, as the appellant had set it forth, and to defend himself, *per corpus suum*; unless he were either maimed, or above 60 years of age,

age, in either of which cases the defendant was to purge himself by one of the ordeals then in use; viz. by hot iron, if he were a free man; or by water, if a villain. But the Law in these cases afterwards became mitigated, for it was not requisite for the defendant to deny every word of the appeal precisely, but a general denying, or pleading not guilty to the whole, was admitted to be sufficient; as also, that he had his choice to defend himself by his body, or put himself upon trial of the country.

If he chose to defend himself by his body, the plaintiff had liberty to counterplead, either that he was under the age of 14 years; or above the age of 70; or a woman; or in holy orders. *Britton*, 40.

But in case the plaintiff had none of these exceptions, then battle was to be joined, and both parties were to find sureties, the one to maintain and the other to defend the appeal, and then the court gave them day to provide
their

their arms, and in the mean time the defendant remained in prison. At the day appointed, they appeared armed in court, and then the defendant was to take the appellant by the hand, and to take his oath, that the appeal was false; and afterwards the appellant was to make like oath, that his appeal was true; which being done, the court committed each of them into the hands of two Knights, or else of two other substantial persons, according to their qualities and degrees, charging them to convey them into the field where they were to fight, without suffering any person to have speech or communication with either of them; and when they were come into the field, then each of them was to make oath again, before the Justices, that they had neither eat nor drank that day, and that he had done nothing, either by himself or any other, whereby the Law of God should be hindered, or the Law of the devil advanced. After which proclamation was made, that none should presume, whatever they saw or heard, to stir or speak, upon pain

of imprisonment for a year and a day ; and then the parties were to fight, with their heads and hands bare, on foot, without any other weapons or armour than a staff, tipped with horn at either end, and a buckler with four corners. And in this manner they fought till one side was overcome or yielded ; which if it were the defendant, he was immediately commanded to execution ; but if it were the plaintiff, he was committed to prison, and both himself and his sureties were to be amerced ; but with this difference, that if he retracted his appeal, he was to be grievously fined for failing in his undertaking. But in case he were vanquished, he was to be dealt withal more favourably, because he had done his utmost endeavour, and was therefore to remain in prison till he could obtain the King's pardon. And in case neither side had the victory before the stars appeared, then was the defendant of course to be acquitted.

If the defendant put himself upon the country, then was he to be tried by a jury,
the

the manner whereof I conceive was much the same as at this day. But because there is little said in the old books of the manner of proceeding by juries in cases of appeals of treason, we must have recourse to what hath been delivered by the later writers upon that subject; but of this we shall have occasion to say more when we come to speak of indictments.

The judgments against such as were convicted of Treason in several ages have been very various; for in the time of King *Alfred*, a traitor was to suffer death, unless he could redeem himself by paying the price of the King's life (which was then valued at 30,000 thrymsas). But this was afterwards altered, by King *Athelstan*, to a purging himself by the Triplex Ordalin, or carrying a hot iron of three pound weight nine paces; and this again was altered by King *Canutus*, who made it death without redemption. And by the Laws of *William* the Conqueror, and *Henry I.* the punishment did not extend to death, but
rather

rather to something that was more cruel than death itself, as cutting off the limbs, dismembering, and putting out the eyes of the offender, which we see practised by *William Rufus* in the case of *W. de Ou*, who was vanquished in an appeal of Treason. And afterwards, by *Glanville*, it seems wholly arbitrary in the King, “*Ex regiæ dispensationis beneficio tam vitæ quam membrorum suorum pendet judicium.*” And though afterwards hanging and drawing came to be always inflicted as part of the judgment, yet was it left to the King to add what more he pleased. “*Soit tregne & pendu & autrement tourmente à la mort a nostre volonte,*” are the words of *Britton*; and, according to his opinion, sometimes the judgment was more or less, according as the King pleased. For some of the Lords attainted 15 E. II. had judgment only to be drawn and hanged, as *Sir Roger Damory*, *Warin de Lisle*, *William Touchett*, the two *Mortymers*, and others, to which beheading was added in the case of the Earl of *Lancaster*, and bowelling and quartering in the

the case of the Lord *Badlemere*, *Ashburnham*, *Cobham*, &c. ; to which also degradation was added, in the case of *Harcla* Earl of Carlisle; yet afterwards *Mortimer* Earl of *March* had judgment only to be drawn and hanged. And long after, viz. in the time of *Henry V.* the judgment against the Earl of *Cambridge*, Lord *Scroop*, and Lord *Grey*, was hanging, drawing, and beheading; and against Sir *John Oldcastle*, 5 *H. V.* hanging and drawing only, to which was added burning, because he had been convicted of heresy. And in the time of *Henry VIII.* the judgment given against Queen *Anne Bolleyne*, was that she should be either burnt or beheaded at the King's pleasure, though this was extraordinary, and the Judges at the very time complained that such a judgment in the disjunctive had never been seen. But in the 13 *H. VIII.* the Duke of *Buckingham* had the ordinary judgment given against him; and so hath been the practice ever since.

The judgment against a woman for Treason was to be burnt, as *Britton* tells us, c. 8.
which

which was the same in all cases ; neither can I find that the practice was ever otherwise. Some think we had this custom from the *Britons*, because *Cæsar*, in his Commentaries, tells us, that was the usual punishment amongst them for women that destroyed their husbands ; which every one knows is one sort of Treason at this day.

The judgment in Petty Treason, as also for counterfeiting of money, hath ever since the 25 of *E. III.* been no other than drawing and hanging ; and so it is at this day. But *Stowe* tells us, that in the 25 *H. I.* the counterfeiter of the King's coin had their hands and privy-members cut off, which was consonant enough to the fore-mentioned Law of his concerning the punishment of Treason. But it must likewise be acknowledged, that Treason was of a much larger extent formerly than it is now, or else that hanging and drawing were inflicted for other notorious crimes, as well as for Treason : for so we find the citizens of *Norwich*, who burnt the cathedral there, were adjudged to suffer ; as
also

also *Joppin*, the Jew, and his accomplices, who crucified the boy at *Lincoln*; as also those that robbed the two cardinal legates, that were going into *Scotland* to treat of a peace between the two kingdoms; none of which facts seem to have been within the compass of Treason. So also was the son of Sir *John Shelford*, who killed his father in the time of *H. III.* Before the Stat. 25 *Ed. III.* the crime of High Treason was very uncertain, but it is now ascertained by that and later Statutes.

Of Clergy in Treason.

It is generally agreed, that before the time of *H. II.* the privilege of the Clergy in criminal causes (this being the chief point in controversy between him and Archbishop *Becket*) did not obtain here in *England*; yet it is evident, from the Laws of King *Canutus*, cap. 38 & 40. that there was something of it in use even in his time, but how it was practised, does not sufficiently appear; but after the death of *Becket* and *H. II.*'s submission to

the Pope to obtain absolution, the Clergy demanded it in all cases, and the temporal courts sought to restrain it, which occasioned several disputes between their jurisdictions. Neither does the Law appear to have been settled in that point till long after: for in the answer to the petition of the Clergy, 25 *Ed. III.* n. 60. upon which the Statute, cap. 4. is grounded, the King says, that he and his progenitors have always been seized *jure coronæ* of the right of giving judgment, and awarding execution against clerks, convict of any manner of Treason that concerned the King and his royal Majesty. And, in the case before mentioned, of Sir *Jo. Gerberge*, it is entered upon the Roll, “*Et quia privilegium clericale in hujusmodi casu seditionis secundum legem et consuetudinem regni hætenus obtenit. et usitat. non est allocand.*” Yet it cannot be denied that sometimes it had been granted, even in cases of High Treason (as the Clergy do allege in the said petition); for besides what we may find upon looking into the cases of *Peter de Rivallis* and *Robert Passelew*, and also of *Randall de Britton*,

a canon

a canon of *St. Paul's*, in the time of *H. III.* and *Walter de Berton*, cited by Sir *E. Coke*, 2 Inst. 634. it is evident, by the Records of the Proceeding against *Adam D'Orleton*, bishop of *Hereford*, that he pleaded Clergy to the indictment against him of High Treason; and being demanded of the archbishop of *Canterbury*, and an inquest of office being taken against him, which found him guilty, he was delivered to him *tanquam convictus*, &c. according to the usual form of proceedings in other cases of Felony. But whether in this case there was not some regard had to his being a bishop, and not an ordinary clerk, is a very great question; since, by the Canon Law, the jurisdiction over bishops is reserved to the Pope alone; and accordingly the Clergy petitioned, 18 *Ed. III.* n. 23. that it might be so enacted; which, though it were not granted by the King, yet we find that, afterwards, in the 2d of *R. II.* the Lords gave judgment against the archbishop of *York* and the bishop of *Chichester*, only of forfeiture; but took time to deliberate how to dispose

of their persons, in such manner as might be best for the honour of God and holy church, and preservation of the Laws of the Realm, which was then a question; and in the 21 R. II. the judgment given against the archbishop of *Canterbury*, for Treason confest by himself, (as it was then taken to be) was only banishment and forfeiture. Yet, 2 H. IV. *Merkes*, bishop of *Carlisle*, was condemned for Treason; and though he obtained the King's pardon, yet *Scroop*, archbishop of *York*, was shortly after, viz. 5 H. IV. not only condemned, but executed, for the like crime, though with great grudging of the Clergy; who not only cried up the archbishop for a martyr, but looked upon the disease with which the King was shortly after seized, and of which he was never cured, as an effect of God's judgment upon him for the same. But from this time forward, I do not find but that it was constantly held, that persons in holy orders, and even bishops themselves, could claim no privilege of Clergy in cases of Treason; and that they

were

were liable to be executed without degradation, as was solemnly resolved by the Judges, Tr. 24 H. VIII.

Page 63. *Reflections on Forfeiture in felo de se.*] Forfeitures in this case, as well as in homicide, by *accident*, or by *necessity in case of self-defence*, seem to be very improper.

The worthy Judge *Foster*, page 264, observes, that “ Judges are Ministers, appointed by the Crown for the ends of public justice, and should have written on their hearts the solemn engagement of their King, in his Coronation Oath, *to cause Law and Justice, in Mercy, to be executed in all his Judgments*; that it is not, therefore, the part of Judges to be perpetually hunting after forfeitures, where the heart is free from guilt; to heap afflictions on the head of the afflicted, and to wound a heart already wounded past cure.”

The obligations to keep this solemn engagement, are well described by the inimitable *Shakespeare*, in the *Merchant of Venice*,

when *Portia* recommends to the Jew to be merciful to the merchant. He asks, "On what compulsion must I?" To which question she makes the following excellent answer:

"The quality of Mercy is not strain'd;
 It droppeth as the gentle rain from heav'n
 Upon the place beneath. It is twice blest'd;
 It blesteth him that gives, and him that takes.
 'Tis mightiest in the mightiest, it becomes
 The throned monarch, better than his crown;
 His sceptre shews the force of temporal power,
 The attribute to awe and majesty,
 Wherein doth sit the dread and fear of Kings;
 But Mercy is above this scept'red sway;
 It is enthroned in the heart of Kings,
 It is an attribute to God himself;
 And earthly power doth shew men likest Gods
When Mercy seasons justice. Therefore, Jew,
 Though justice be thy plea, consider this,
 That in the course of justice none of us
 Should see salvation, we do pray for mercy,
 And that same pray'r doth teach us all to render
 The deeds of Mercy."

Page 65. *There are many niceties respecting the presumptions implying malice, and many other parts;*

parts; for which we refer the curious to Coke, Hale, Hawkins, &c.] Some of the distinctions in our books, which are now held as Law, appear to be subject to very material objections.

The Author of the Principles of penal Law has given us many useful observations on the impropriety of that doctrine in our Law, which says, that external, unconnected circumstances shall regulate the nature and enormity of crimes; and that the intention shall be transferred to the accident which results from it. His words are as follow :

“ Involuntary manslaughter happeneth in the case of accidental death, ensuing upon an act unlawful as *malum in se*, but in the nature only of a trespass. But if the homicide be in consequence of an act felonious in itself, or in prosecution of a felonious intent, it will be murder.

It is not difficult to illustrate this distinction by an example; though I purposely

avoid any mention of adjudged precedents, that I may not be led into a long, and wearisome labyrinth of facts. It is extremely dangerous to give any extract from cases of homicide, where *every circumstance weigheth* “*something in the scale of justice,*” and where imperfect reports have the most fatal tendency.

A man shooting at a bird, and using proper and ordinary caution to prevent danger, unfortunately happeneth to kill his neighbour. The guilt of this man in the eye of our law, and consequently the proportion of his punishment, will depend, partly on the nature, shape, and size of the bird; and partly on the intention of the man with respect to the bird; but will have no connection whatever with the act of homicide.

If the bird chanceth in evidence to prove a wild pigeon, *feræ naturæ et nullius in bonis*, it will be excusable homicide; if a tame fowl, and shot at for the amusement or improvement

ment of the marksmen, it will be felonious, and manslaughter, because an unlawful trespass on the property of another; lastly, if the bird were private property and intended to be stolen, which must be collected from the circumstances, it will be murder, by reason of that felonious intent.

Such on this point is the doctrine of our law; and infinite is the variety of constructive crimes, which have been established thereon; the instance, which I have selected, is no exaggeration.

That external, unconnected circumstances should regulate the nature and enormity of crimes, that the intention should be transferred to the accident which results from it, are positions, which, in their present extent, have ever seemed to me most preposterous and unnatural. They bear however the venerable stamp of antiquity; and the errors derived from them, if indeed they be errors, are the accumulation of many centuries.

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I proceed therefore with diffident and trembling steps on this hitherto untrodden ground; fearful, though in the pursuit of truth and the defence of natural rights, of wandering into the mazes of absurdity, or striking at the fundamental principles of Government.

It is true, that crimes are to be estimated, in some degree, by the actual mischief done to society; because the internal malignity of mankind is not within the cognizance of human tribunals.

But, if this position were received in its fullest latitude, it would prove too much; it would prove that every act of homicide is equally criminal, and that the intention is in no case to be considered. The following restriction should then be observed, as inviolably connected with the principle. *Every member of society hath a right to do any act without the apprehension of other inconveniences, than those which are the proper consequences*

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quences

quences of the act itself; for it is the right of every member of society to know, not only when he is criminal, but in what degree he is so. This is the great boundary of political liberty; which gives way to insecurity and danger, whenever the arbitrary inferences of magistracy are admitted within its confines. Can it be said, consistently with this principle, that the casual consequence of an intended larceny shall be liable to receive the appellation and punishment of wilful murder? This may be reconciled to the philosophy of slaves; but it is surely repugnant to that noble and active confidence, which a free people ought to possess in the Laws of their constitution, the rule of their actions.

Yet there are some cases in which it may be reasonable to carry over the felonious intent to commit one act, to a different act ensuing in prosecution thereof. As when a potion is given to the mother to destroy the child of which she is pregnant, and it kills the mother; this is murder, and hath been so adjudged. In like manner, ‘ if a man lay
poison,

‘poison with an intent that B. should take it,
 ‘and C. by mistake takes it, and is poisoned
 ‘to death; this is murder, though it were
 ‘not intended for him.’ So, ‘when a man
 ‘intending to burn one house, in execution
 ‘thereof happens to burn another house,
 ‘this is a malicious and felonious burning,
 ‘for it springs out of a malicious and felo-
 ‘nious intent.’ *But* in all these cases it should
 be observed, that the consequence partici-
 pates the nature of the original crime, and
 that the general malice of the intention is
 followed by a fact of the same degree and
 kind.

When it was said, that involuntary man-
 slaughter happens in the case of accidental
 death ensuing upon unlawful acts; I ought to
 have added, that acts lawful in themselves,
 but done without due care and circumspec-
 tion, are to be considered as unlawful, and
 even as felonious in their construction, if done
 with a negligence so notorious as to imply
 malice against all mankind. And on this
 distinction,

distinction, a killing, in consequence of a piece of timber or stone thrown from the top of a house into the street is always cited in our books as an instance of homicide, which may be misadventure, manslaughter, or murder, according to the circumstances of the case."

Page 104. line 14. *Our tendernefs for life makes the Law require fuch strong evidence of the crime, that the proof is extremely nice and difficult, &c.]*

Lord Chief Justice *Hales*, in treating on this subject, in Vol. 1st of his History of the Pleas of the Crown, p. 634. after taking notice that it is the excellency of the trial by jury, that they are triers of the credit of the witnesses, as well as of the truth of the fact: that it is one thing whether a witness be admissible to be heard, and another thing whether he is to be believed when heard—goes on in speaking of this crime as follows: "It must be remembered, that this is an accusation easy to be made and hard to be proved; but harder to be defended by the party accused,

cusd, be he never so innocent. And we ought to be the more cautious, because the heinousness of the offence many times transporteth the Judge and the Jury with so much indignation, that they are over-hastily carried to conviction of the person accused, by the confident testimony of sometimes false and malicious witnesses."

Page 107. line 1 & *seq.* This crime, as Sir *Edward Coke* observes, in the 2d Volume of his *Institutes*, p. 180, had a punishment under such a condition as no other felony had the like, for the offender was adjudged—"Amittere oculos quibus virginem concupivit; amittere etiam testiculos qui calorem stupri induxerunt."

Page 119. *Of Mayhem.* This crime was, by the ancient Law of *England*, punished by the rule of retaliation.—This rule was agreeable to the Law of the twelve Tables, which says, "That if a person breaks a limb, unless satisfaction be given and accepted, the *Lex Talionis* should take place."

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The Statute relating to this crime, passed in the 5th year of *Henry the Fourth*, c. 5. makes it felony *to cut out the tongue, or put out the eyes of any of his Majesty's subjects of malice prepense.*—And the Statute of 22d and 23d of *Charles the Second*, c. 1. enacts, that any person, who, by lying in wait, shall *slit the nose, or cut off or disable any limb or member of any subject of his Majesty, with intent, in so doing, to maim or disfigure, shall suffer Death without Benefit of Clergy.*

Page 124. par. 1. The words of Sir *Henry Spelman*, alluded to in this paragraph, are as follow :

“Animadvertē autem in quantam asperitatem ex rerum temporumque vicissitudine, lex antiqua abripitur. Quod enim olim XII vānit denariis, hodie sæpe XX solid. imo XL, vel pluris est; nec vita hominis interea charior, sed abjectior.”

Page 155. par. 3. By the Statutes mentioned in this paragraph, it is made Felony
without

without Benefit of Clergy, “to set fire to any house, barn, or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood.” This clause, as is well observed in *Principles of Penal Law*, is a strong instance of the vague, unfeeling, undistinguishing carelessness with which Penal Laws have been composed, even in the most polished times. The penalty should, in all cases, if possible, bear some proportion to the malice and mischief of the offence; but every idea of proportion is obliterated, when the same degree of guilt and punishment is assigned to the incendiary of a populous town, and to the destroyer of a small heap of dried grass.

Page 183. line 7. *To banish notorious offenders from one part of the King's dominions to another is only to shift, not to remove the grievance.*] In Mr. Smith's History of *New York*, page 207, there is inserted a copy of a paper, which, he says, had been lately published there, with a view of shewing the mischievous tendency of the Transportation Laws.

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The paper, he says, was intitled, *The Independent Reflectors*, and is as follows :

“ It is too well known, that, in pursuance of divers acts of parliament, great numbers of fellows, who have forfeited their lives to the public, for the most atrocious crimes, are annually transported from home to these plantations. Very surprising, one would think, that thieves, burglars, pickpockets, and cut-purses, and a herd of the most flagitious banditti upon earth, should be sent as agreeable companions to us ! That the Supreme Legislature did intend a transportation to *America*, for a punishment of these villains, I verily believe; but so great is the mistake, that, confident I am, they are thereby, on the contrary, highly rewarded. For what, in God’s name, can be more agreeable to a penurious wretch, driven, through necessity, to seek a livelihood by breaking of houses, and robbing upon the king’s highway, than to be saved from the halter, redeemed from the stench of a gaol, and transported, passage free, into a country, where, being unknown, no man can reproach

him with his crimes; where labour is high, a little of which will maintain him; and where all his expences will be moderate and low. There is not a thief in *England*, that would not rather be transported than hanged. Life, in any condition but that of extreme misery, will be preferred to death. As long, therefore, as there remains this wide door of escape, the number of thieves and robbers at home will perpetually multiply, and their depredations be incessantly reiterated.

“ But the acts were intended, *for the better peopling the Colonies*. And will thieves and murderers be conducive to that end? What advantage can we reap from a colony of unrestrainable renegadoes? Will they exalt the glory of the crown? or rather, will not the dignity of the most illustrious monarch in the world be sullied, by a province of subjects so lawless, detestable, and ignominious? Can agriculture be promoted, when the *wild boar of the forest breaks down our hedges and pulls up our vines*? Will trade flourish, or manufactures be encouraged, where property is
made

made the spoil of such who are too idle to work, and wicked enough to murder and steal?

“ Besides, are we not subjects of the same King with the people of *England*; members of the same body politic, and therefore entitled to equal privileges with them? If so, how injurious does it seem to free one part of the dominions from the plagues of mankind, and cast them upon another? Should a law be proposed to take the poor of one parish, and billet them upon another, would not all the world, but the parish to be relieved, exclaim against such a project, as iniquitous and absurd? Should the numberless villains of *London* and *Westminster* be suffered to escape from their prisons, to range at large and depredate any other part of the kingdom, would not every man join with the sufferers, and condemn the measures as hard and unreasonable? And though the hardships upon us are indeed not equal to those, yet the miseries that flow from laws, by no means in-

tended to prejudice us, are too heavy, not to be felt. *But the Colonies must be peopled.*

“ Agreed : And will the transportation acts ever have that tendency ? No ; they work the contrary way, and counteract their own design. We want people, ’tis true, but not villains, ready at any time, encouraged by impunity, and habituated, upon the slightest occasions, to cut a man’s throat, for a small part of his property. The delights of such company is a noble inducement, indeed, to the honest poor, to convey themselves into a strange country. Amidst all our plenty, they will have enough to exercise their virtues, and stand in no need of the association of such, as will prey upon their property, and gorge themselves with the blood of the adventurers. They came over in search of happiness ; rather than starve, will live any where, and would be glad to be excused from so afflicting an antepart of the torments of hell. In reality, Sir, these very laws, though otherwise designed, have turned out, in the end, the most effectual expedients,
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that the art of man could have contrived, to prevent the settlement of these remote parts of the King's dominions.

“ They have actually taken away almost every encouragement to so laudable a design. I appeal to facts. The body of the *English* are struck with terror at the thought of coming over to us, not because they have a vast ocean to cross, or leave behind them their friends; or that the country is new and uncultivated: but from the shocking ideas, the mind must necessarily form, of the company of inhuman savages, and the more terrible herd of exiled malefactors. There are thousands of honest men, labouring in *Europe* at four pence a day, starving in spite of all their efforts, a dead weight to the respective parishes to which they belong; who, without any other qualifications than common sense, health, and strength, might accumulate estates among us, as many have done already. These, and not the others, are the men that should be sent over, for the *better peopling the plantations*.

tions. *Great Britain* and *Ireland*, in their present circumstances, are over-stocked with them; and he who would immortalize himself, for a *lover of mankind*, should concert a scheme for the transportation of the industriously honest abroad, and the immediate punishment of rogues and plunderers at home. The pale-faced, half-clad, meagre, and starved skeletons that are seen in every village of those kingdoms, call loudly for the patriot's generous aid. The plantations too would thank him for his assistance, in obtaining the repeal of those laws which, though otherwise intended by the legislature, have so unhappily proved injurious to his own country, and ruinous to us.—It is not long since a bill passed the Commons, for the employment of such criminals in his Majesty's Docks, as should merit the gallows. The design was good. It is consistent with sound policy, that all those, who have forfeited their liberty and lives to their country, should be compelled to labour the residue of their days in its service,

“ But

“ But the scheme was bad, and wisely was the bill rejected by the Lords, for this only reason, That it had *a natural tendency to discredit the King's Tards*: the consequences of which must have been prejudicial to the whole nation. Just so ought we to reason in the present case, and we should then soon be brought to conclude, that though peopling the colonies, which was the laudable motive of legislature, be expedient to the Publick; abrogating the Transportation Laws must be equally necessary.”

Page 218. line 1. *Was the greatest part of the forfeiture to be applied to the prosecutor, it would in fact aggravate the punishment of such delinquents, &c.*] There is an entertaining passage in *Boccalini's Parnassus* applicable to this subject—Advertisement 97—where Apollo sentences Butler to pay the forfeiture of his recognizance for having wounded a Virtuoso.—The story follows:

“ The last time his Majesty visited the prisons, *Butler*, who had been committed for
N 4 breaking

breaking the peace, by wounding a *Virtuoso*, after he had entered into a recognizance to live quietly and peaceably, was discharged, and *Apollo* laughed at the plaintiff for his folly, telling him he deserved no better, who trusted his life upon such slender security; as if a man did not prefer the pleasure of revenge before the forfeiture of a little money.

“ But, however, the other day the Attorney General summoned *Butler*’s security to pay the forfeiture of the recognizance. *Butler*, who thought his Majesty, at the same time he discharged him out of prison, had pardoned the forfeiture likewise, immediately complained to *Apollo* of the trouble the Attorney put him and his sureties to: but his Majesty told him, he had only pardoned the crime he committed in wounding one of his subjects, not the penalty which was forfeited, by breaking the peace; wherefore he gave orders, the Poet should forthwith pay the *Virtuoso* the sum of two hundred pounds, the full penalty of the recognizance.

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“ The Attorney hearing his Majesty’s order, told him, That the penalty was made payable into the *Exchequer*, not to the *Virtuoso*. This custom appeared something new and out of the way to *Apollo*, who in a heat asked the Attorney, what reason there was that the *Virtuoso* should be injured, be wounded, and another receive the benefit of the money forfeited ? The Attorney replied, That was the custom throughout all *Parnassus*, and most of the provinces in *Europe*, and he hoped his Majesty would not alter the precedent.

“ *Apollo* being very angry to hear this, said, That princes ought rather to prevent crimes by inflicting severe punishments upon offenders, than encourage them by such slight penalties, and by making merchandize of their subjects blood ; and therefore ordered him to take care that *Butler* should pay the monies forthwith to the *Virtuoso*, and not into the *Exchequer* ; for there was all the reason in the world, that he should receive the advantage of the money, who had been prejudiced by
the

the wounds. It is almost incredible to think, what uneasiness *Butler* shewed in telling out the money, his passion made him make twenty mistakes; and at last he broke out into this expression, Nothing troubles me, but that the *Virtuoso* should have this money. By which all people perceived his Majesty's infinite wisdom, *and that nothing so much allayed the pleasure of revenge, even in those who were the most passionate, as the vexation of doing an enemy good.*"

Page 239. chap. 7. *The crime of Adultery was among the Saxons punished by a fine called Lecherwite.*]—In *Domesday Book* it is said, "*Quod adulterium faciens, 8 s. 4 d. emendabit homo, & femina tantundem: Rex habeat hominem adulterum, Archiepiscopus feminam.*"

The criminality of *Adultery*, as is well observed by the learned Author of a treatise entitled, *Sketches of the History of Man*, "depends in some measure on the nature of the matrimonial engagement. Where wives are purchased

chafed and polygamy indulged, Adultery can scarce be called a crime in the husband ; and where there are a plurality of wives, sound sense makes it but a venial crime in any one of them.—In *China*, and the neighbouring kingdom of *Laos*, the adulteress was sold for a slave.—Among the *Negroes* this crime is slightly punished.—But in many countries where polygamy prevails, the punishment for female adultery is very severe. It is indeed more or less severe, in proportion as the men are more or less prone to revenge.”

“ The *Chinese* are a mild people, and depend more on locks and bars for preventing Adultery, than on severity ; the punishment being only to sell an adulteress for a slave. The same law obtains in the kingdom of *Laos*, bordering upon *China*. An adulteress among the ancient *Egyptians* was punished with the loss of her nose. In ancient *Greece*, a pecuniary penalty was inflicted on an adulterer *. An adulteress was probably punished more severely.

* *Odyssæy*, Book viii. l. 348.

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Among the *Negroes*, who have very little delicacy, Adultery is but slightly punished; except in the kingdom of *Benin*. There an adulteress, after a severe whipping, is banished; and the adulterer forfeits his goods, which are bestowed on the injured husband. Among the ancient *Germans*, a grave and virtuous people, Adultery was extremely rare. An adulteress was deprived of her hair, expelled from her husband's house, and whipped through the village †. In *Japan*, where the people are remarkably fierce, female Adultery is always punished with death. In *Tonquin*, a woman guilty of Adultery is thrown to an elephant to be destroyed. By the Law of *Moses*, an adulteress is punished with death, as also the adulterer ‡. *Margaret* of *Burgundy*, Queen to *Lewis Hutin*, King of *France*, was hanged for Adultery; and her lovers were flea'd alive."

"Such were the savage manners of those times. There is an old law in *Wales*, That

† Tacitus, de moribus Germanorum, cap. 19.

‡ Leviticus, xx. 10.

for defiling the Prince's bed, the offender must pay a rod of pure gold, of the thickness of the finger of a ploughman, who has ploughed nine years, and in length from the ground to the prince's mouth when sitting."

The same Author treating of *Polygamy* "observes, that *Cicero* and many other Authors are of opinion, that women were in ancient times used to a promiscuous commerce with the men.—*Cæsar* says, that among the *Britons* it was usual for brothers, or other near relations to use their wives promiscuously, and for each man to maintain the children that were produced by his own wife.—But this custom did in effect put all women on the footing of prostitutes; besides that this promiscuous commerce among the sexes had, as it has at present among nations where polygamy prevails, the certain effect of preventing population." The Author gives many cogent arguments against a promiscuous use of women, and also against *Polygamy*: and has well

well observed, “ that *Polygamy* was introduced in savage times, when it was customary to purchase wives, who were then considered merely as slaves, and were actually employed, in general, in the servile offices of the family. In most civilized nations, however, one man is confined to one wife, and one woman to one husband ; and this seems, from the equality of males and females, to be pointed out by Nature, as well as the Holy Scripture.”

Page 250. parag. 2. *Montesquieu* tells us, that it was formerly the custom in France, to cut off the ears or slit the nose of the deserter ; and says, it was absurd to relinquish this practice for the punishment of death. Soldiers are habituated to the contempt of death and the dread of shame ; so that the terrors of the penalty were diminished, while they were intended to be increased. *L'Esprit des Loix*, l. vi. c. 12.

Diodorus Siculus, in his 12th book, chapter 12, says, that *Charondas*, the Lawgiver of the *Thurians*,

Thurians, enacted, that deserters should sit three days in the market-place, clothed in female dresses; and he says, that this law excelled the provisions of other Lawgivers on the same subject, both in humanity and wisdom.

N O T E S

O N

V O L U M E III.

A P P E N D I X.

PAGE 30. Par. 2. The words of *Grotius* in the original are:

“ Successio ab intestato quæ dicitur, posito dominio remota omni lege civili, ex conjectura voluntatis naturalem habet originem. Nam quia dominio ea vis erat, ut domini voluntate transferri in alium posset, etiam mortis causa ac retenta possessione, si quis voluntatis suæ nullam edidisset testationem, cum tamen credibile non esset ejus cum mentis fuisse, ut post mortem suam bona occupanti cederunt; sequebatur ut ejus esse

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bona

bona intelligerentur, cujus ea esse voluisse defunctum maxime erat probabile. Creditur autem in dubio id quisque voluisse, quod æquissimum atque honestissimum est."

Page 34. par. 2. *By which, as Puffendorf justly observes, is to be understood, not only a sufficiency to preserve life, or a bare existence, but such a share as may help to qualify the child for society, and render him fit for the purposes of civil life.] Puffendorf's words are:*

" Sub nomine alimentorum veniunt, non solum, quæ ad naturalem vitam conservandam sunt necessaria, sed quæ hominem ad socialem vitam & civilem reddunt idoneum."

Page 43. par. 1. The President *De Gouet*, Author of the *Origin of Laws*, observes, " That it was not necessary that the covenants, or conditions, on which the Laws in the first ages were founded, should be express. It was sufficient, he says, that they were in many cases tacitly understood. Such
were,

were, for example, says he, The rule not to injure each other :—That of being faithful to our engagements :—Not to rob another of his lawful possessions :—*That the son should be heir to his father, &c.*—There was no need, he continues, of any particular solemnities in establishing such rules and maxims as these : they derive their origin from those sentiments of equity and justice, which God has engraven on the hearts of all men. They are taught us by that internal light, which enables us to distinguish between right and wrong ; dictated by that voice of Nature, which will make itself be heard, or will alarm the soul with tormenting remorse, as often as its dictates are disobeyed.”

Page 49, and 50. *Cicero*, in his oration for *Sextus Roscius*, when *Ennius* argued, that the father of *Roscius* intended to disinherit him, very properly replies,—“ *That it was the business of the accuser, to expose all the failings and vices of the son, which could incense a parent so far, as to induce him to do such violence to Nature, to cast away all that*

affection which is innate in the mind, and in short to forget that he was a father."

Cicero's words are,—“ Id erat certi accusatoris officium omnia vitia atque peccata filii, quibus incensus parens potuerit animum inducere, ut naturam ipsam vinceret, ut amorem illum penitus insitum ejecerit; ut denique patrem se esse oblivisceretur.”

Our Law is so favourable to the rights of blood, that if a man leaves by will to his son an estate which would have descended to him as heir, supposing the father to have made no will, the rights and consequences of the son's succession are those of one claiming as heir by descent, and not by devise: because greater regard ought to be paid to the disposition of Nature than to the creation of Law.

It will not be amiss here, to give a few, out of many good extracts which might be made on the subject of this Essay, from the Code of Laws published by the Empress of *Russia*.

C H A P. VIII.

“ART. 94. It were unjust to inflict the same punishment upon the highway-robber, as upon him who both robs and assassinate. For the public security therefore, it is evidently necessary to make some difference in the punishment prescribed for these several crimes.

“ART. 95. There is a country, where thieves do not commit murder : the reason is, because while thieves are there left to hope for transportation to the Colonies, murderers are excluded from that hope.

“ART. 96. Good laws adopt the just medium. They do not in all cases impose pecuniary mulcts, nor do they in all cases inflict corporal punishments. All punishments whatever, that mutilate or disfigure the human frame, ought to be abolished.

C H A P. X. QUEST. 5.

“How to proportion punishments to the greatness of crimes.

“ART. 205. The end proposed in the institution of punishments, cannot be to torment a being
whom

whom God has endued with feelings. The object of punishments is to prevent the guilty in future from doing injury to society, and to deter their fellow-citizens and countrymen from committing the like offences: and such punishments, accordingly, ought to be applied, as, being proportioned to the crimes, may make the most lively and durable impression upon men's minds, at the same time that they are attended with the least appearance of cruelty to the body of the criminal.

“ ART. 206. Who does not tremble with horror at seeing in history so many barbarous and useless tortures, invented and employed in cool blood, by men who call themselves Sages? Who does not feel his inmost soul agonized at the sight of those thousands of unfortunate wretches who have suffered, and are daily suffering them; accused of crimes often improbable (not to say impossible); often merely suggested by ignorance, and sometimes by superstition? Who is there, I say, that can steadfastly and unpitying, behold men, racked and torn to pieces by men, their brethren, and that too with horrid pomp and parade? Those countries, and those times in which the most cruel punishments were inflicted, are those in which we have seen the most atrocious enormities perpetrated in the most daring manner.

“ ART.

“ART. 207. For a punishment to produce the desired effect, it is enough that the evil which it occasions exceed the fancied advantage resulting from the crime; at the same time taking into the account of such evil, preponderating the good, the certainty of the punishment, and the loss of those advantages which the crime might be supposed to produce. All such severity as exceeds these limits, is useless, and consequently tyrannical.

“QUEST. 6. ART. 209. Whether punishment by Death is of utility, and necessary for the security and good order of a state?

“ART. 210. Experience demonstrates, that the frequent repetition of capital punishments hath never yet made men better. If therefore I can shew that *in the ordinary state of Society*, the death of a citizen is neither useful nor necessary, I shall have pleaded the cause of humanity with success. I said, “in the *ordinary State* ;” for the death of a citizen may be necessary in one particular case; I mean when, though deprived of liberty, he hath still means and power left to disturb the national repose; a case which can never happen, except when a people loses or recovers its liberty, or in times of anarchy when disorder and confusion usurp the place of laws. But while those laws bear quiet and peaceful sway, and under a form of government approved by

2

the

the united voice of the nation; in a State defended against enemies from without, sustained by the firm basis of power and general sanction from within, and where authority is lodged in the hands of the Sovereign: In such a state there can be no necessity for taking away the life of a citizen. The twenty years reign of the Empress *Elizabeth* gave the fathers of the people a more excellent pattern, than that of all the pomps of war, victory, and devastation, held forth by the most glorious conquerors.

“ART. 226. If two crimes, unequally hurtful to Society, receive an equal punishment, this unequal distribution of penalty will produce that strange contradiction, little attended to, though very frequently obvious; ‘That the laws will have occasion to punish crimes, which they themselves have countenanced.’

“ART. 227. If the same punishment be assigned for him who kills a brute animal, as for him who kills a man, or forges a writing of great importance, there will soon be no difference or distinction made between these crimes, by careless and profligate men.”

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